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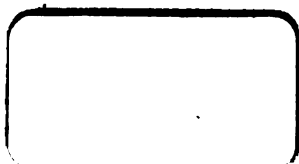
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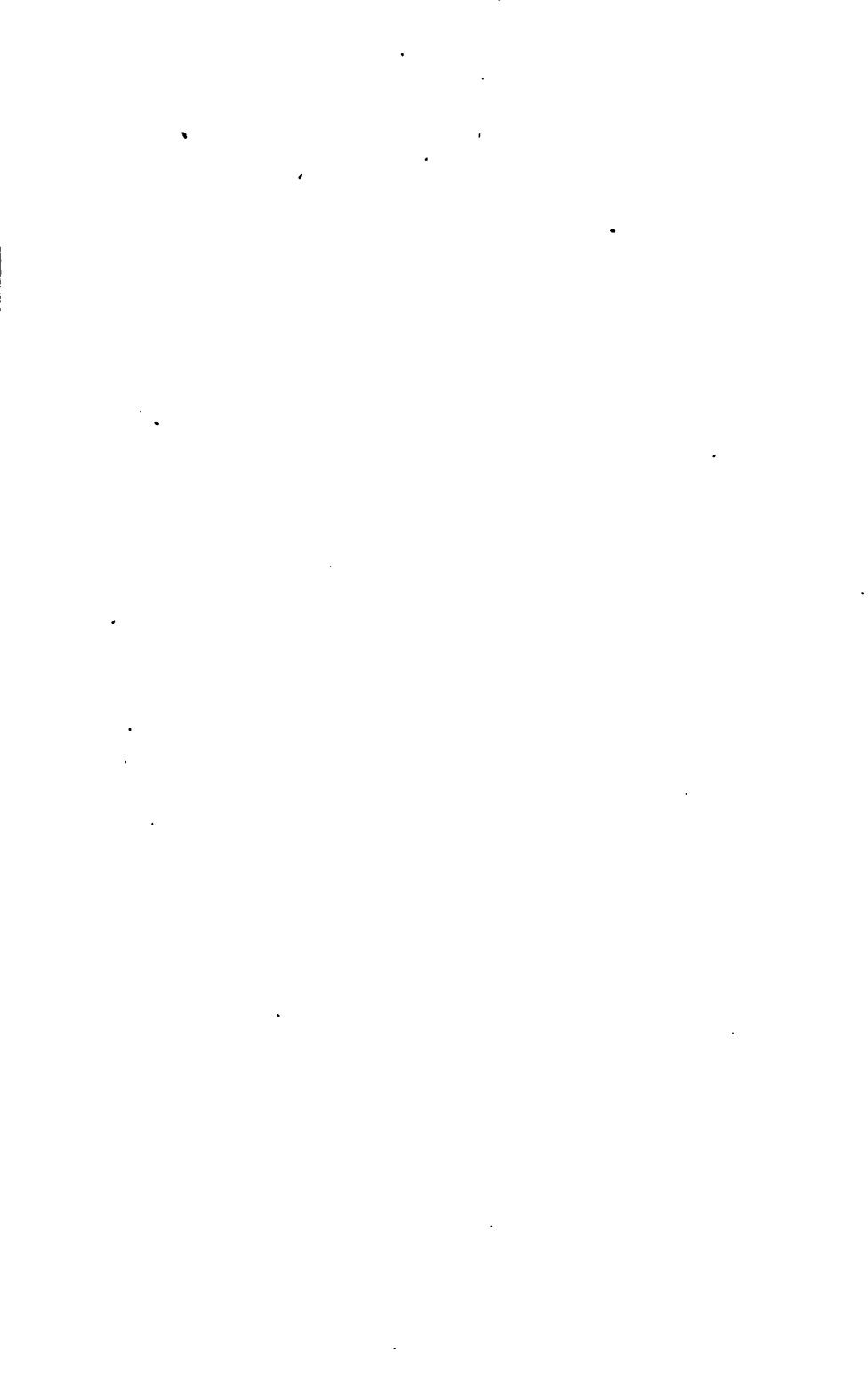
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THE
ONTARIO WEEKLY REPORTER

AND

INDEX-DIGEST

JUNE-DECEMBER, 1906

EDITOR:
E. B. BROWN, ESQUIRE
BARRISTER, ETC.

VOLUME VIII.

TORONTO :
THE CARSWELL COMPANY, LIMITED
1907.

Entered according to Act of the Parliament of Canada, in the year one thousand nine hundred and six, by THE CARSWELL COMPANY, Limited, in the office of the Minister of Agriculture

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(TO AND INCLUDING JUNE 9TH, 1906.)

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TORONTO, JUNE 14, 1906.

No. 1

JUNE 4TH, 1906.

DIVISIONAL COURT.

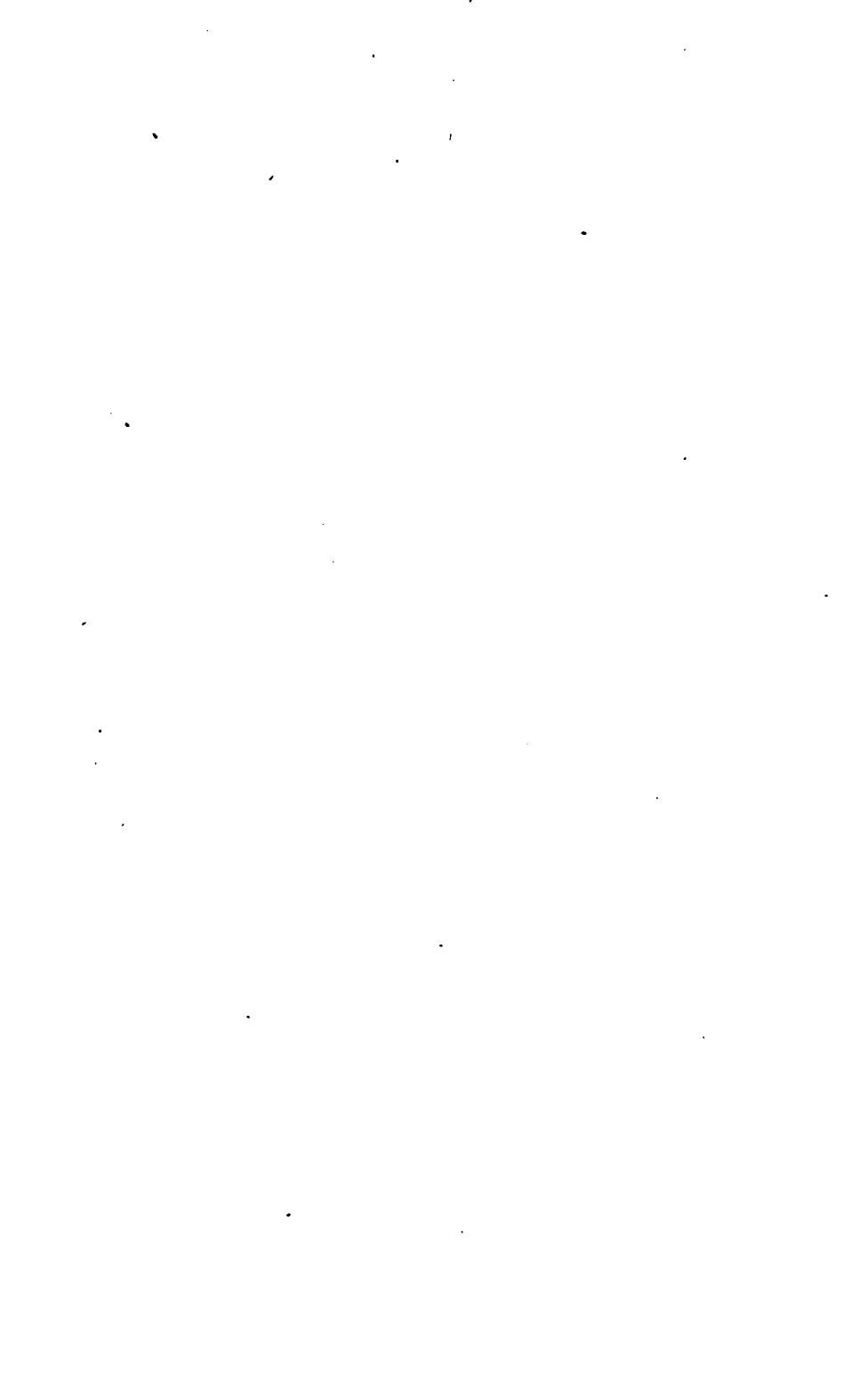
RE COUNTY OF VICTORIA AND TOWNSHIP OF
CARDEN.

(RE MUD LAKE BRIDGE.)

*Municipal Corporations—Bridge—Maintenance and Repair
by County—Length of Bridge—Mode of Estimating—
Municipal Act, secs. 605, 617 a.*

An appeal by the corporation of the county of Victoria from an order of the Judge of the County Court of that county, dated 12th March, 1906, declaring the bridge in question a county bridge to be maintained and kept in repair by the appellants and at their costs.

The order was made upon the application of the respondents, the corporation of the township of Carden, and under the authority of sec. 617a of the Consolidated Municipal Act, 1903, which enables a council of a township in which "a bridge over 300 feet in length, is situate, to declare by resolution that, owing to the bridge being over that length, and "being used by the inhabitants of municipalities other than the township, and being situate on a highway which is an important road affording means of communication to several municipalities, it is unjust that the township should be liable for the maintenance and repair of the bridge. and that it should be main-







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EDITOR :
E. B. BROWN, Esquire
BARRISTER, ETC.

VOLUME VIII.

TORONTO :
THE CARSWELL COMPANY, LIMITED
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them, there would be no loss. If he could have entered into them, then comes the question of what the loss was." How the Master came to take the view that this was an adjudication that plaintiff was entitled to an account of profits which might have been made out of all the projected contracts, upon the assumption that they could all have been obtained and carried out, though it should be shewn that it was impossible to procure some of them, for causes for which defendant was not responsible, I cannot understand. If anything, it seems rather to be an expression of the Judge's opinion that damages should be assessed only in respect of contracts which defendant might have procured had he retained the gravel pit. But I think the correct view is that upon this point the judgment must be read as requiring the Master, in dealing with the question of damages, to determine the basis upon which they should be allowed.

As the Master has proceeded upon a misconception of the judgment and of the scope of the reference, these matters might, upon this ground alone, be referred back to him for adjudication. But, to avoid further possible complications and delay, I deem it better now to express my view as to the true interpretation of the contract itself, which counsel for plaintiff contended supports the Master's finding as to the basis upon which damages should be assessed.

After a recital, *inter alia*, that defendant "is about to enter into certain contracts hereinafter referred to," this document proceeds as follows:

"Now this agreement witnesseth that, in consideration of the hereinbefore mentioned mutual covenants, promises, and conditions, the said parties hereto do hereby mutually covenant, promise, and agree to and with each other in manner and form following, that is to say:—

"The said Willox is to enter into contracts as follows, with the Niagara Construction Limited for the supply of from 15,000 to 25,000 yards of sand; with M. P. Davis for the supply of about 25,000 yards; with A. C. Douglas for the supply of about 10,000 yards; with H. C. Symmes for the supply of about 10,000 yards; with the Electrical Development Company Limited for the supply of about 15,000 yards; all at a price not less than 85 cents a yard delivered upon their

respective works, unless otherwise agreed to between the parties hereto."

The agreement then provides for the indorsement by plaintiff of defendant's notes to the extent of \$5,000, in consideration of his receiving "one-fourth interest in all or any profits arising out of the above mentioned contracts;" gives the plaintiff a lien upon the gravel pit for all moneys which he may have to pay on account of such indorsements; and provides for an accounting of such profits, etc.

After carefully considering all the terms of this agreement, I am of opinion that, upon its true interpretation, defendant did not bind himself absolutely and in any event to obtain and carry out all the contracts mentioned in the paragraphs above quoted. That his being able to procure such contracts was contingent and uncertain, and was so regarded by the parties to this action, is manifest in the provision as to the minimum price of "85 cents a yard delivered upon the respective works, unless otherwise agreed to between the parties hereto. Clear and explicit language should be found expressing such an onerous obligation, when a Court is asked to hold that a party has bound himself in any event to perform that which he can only accomplish, if at all, with the concurrence of third persons, over whom he has no control. Such a bargain can, of course, be made. But I do not find in this agreement enough to warrant a conclusion that defendant bound himself to pay to plaintiff as damages, should he be for any cause unable to procure any of the contemplated contracts, a sum equivalent to the profits which he could have realized by the performance of such contracts if obtained.

The defendant's agreement was, I think, to procure and carry out such of the named contracts as could be obtained, and to account to the plaintiff for the profits to arise therefrom. See *Clifford v. Watts*, L. R. 5 C. P. 577; *Howell v. Coupland*, 1 Q. B. D. 258.

The defendant assumed the onus of proving that he could not obtain certain of these contracts. Whether he was bound to prove this negative may be open to question. But the Master, I think, erred in rejecting the evidence which defendant tendered to discharge the burden so assumed.

A number of minor matters were discussed upon the argument as to the quantum of the allowance made by the Master.

These I deem it better to leave open until the damages have been assessed on the basis above indicated. Should defendant be dissatisfied with the new assessment, his right of appeal should be open in respect of all matters argued before me and not now dealt with.

The only other matter upon which it seems desirable now to express an opinion is the question whether plaintiff should be deemed entitled to a one-fourth interest in profits, or to a one-third interest as a partner in this business of defendant. There being no evidence that plaintiff elected in any way or at any time to "avail himself of the latter option" (to quote the language of the contract), the Master was, in my opinion, quite right in holding that his interest was one-fourth of those profits in which he should be held entitled to share.

The matters in question will, therefore, be referred back to the Master at Welland to assess plaintiff's damages upon the basis which I have indicated. All costs will be reserved to be disposed of by the Court upon the ultimate motion for further directions, except the costs of this appeal, which must be borne by plaintiff in any event.

CARTWRIGHT, MASTER.

JUNE 11th, 1906.

CHAMBERS.

CROWN BANK OF CANADA v. BULL.

Summary Judgment—Rule 603—Defence—Failure to Show—Refusal of Leave to File Second Affidavit—Conditional Leave to Defend—Payment into Court.

Motion by plaintiffs for summary judgment under Rule 603.

F. Arnoldi, K.C., for plaintiffs.

J. F. Hollis, for defendant.

THE MASTER:—The action is on an acceptance of defendant which was due on 8th October, but no proceedings were taken until 15th May. This acceptance was a renewal of one

given on 31st May, 1905. The defendant has filed an affidavit which proceeds on the theory that the action is brought on the first acceptance. He alleges certain transactions and agreements which all occurred before the renewal was given, and there is, therefore, strictly speaking, no answer to this motion. Counsel for defendant stated that this is a mistake, and asked leave to withdraw this affidavit and file another.

Defendant has full knowledge of all the facts, and, as a solicitor, is well aware of what would constitute a sufficient answer to this motion. And it was not unreasonably argued that this mistake, if mistake it was, is a matter to raise doubts as to there being any real defence. Such doubt is to be quieted not by filing another and different affidavit, but by paying into Court, on or before 13th June, \$400, upon which the motion will be dismissed with costs in the cause. In default, judgment with costs.

HODGINS, MASTER IN ORDINARY.

JUNE 23RD. 1898.

MASTER'S OFFICE.

RE UNION FIRE INS. CO.

Company—Winding-up—Interest on Creditors' Claims—Right to, after Winding-up Proceedings Begun.

In the winding-up payment was made to the liquidator's solicitors of a sum for costs, which, when deducted from the moneys in Court, left a shortage in respect to interest on the claims of creditors who had been by order scheduled as against the company's deposit with the Receiver-General.

An application was made by certain of these creditors to compel the liquidator to replace so much of the amount so paid for costs as would provide for interest on the scheduled claims.

THE MASTER:—On 19th November, 1888, an order was made for the payment out of \$1,047.49 for costs to Bain & Co., solicitors for the liquidator, on an affidavit which, among other matters, stated that there was then in Court to the credit of the action of Clarke v. Union Fire Insurance

Co. the sum of \$1,249.37, as shewn by the certificate of the accountant.

This sum was part of a fund in Court which by the Master's report made on 26th March, 1884, was specially appropriated for the payment of a dividend of 27½ cents on the dollar to the creditors whose names, together with the amounts of their claims, appeared in the schedule to the report. The original fund with a small addition was the amount of the deposit made by the company with the Dominion government pursuant to the Insurance Acts, which declared that on the insolvency of the insurance company it should be applied pro rata towards the discharge of all claims of policy-holders in Canada as set out in a schedule of claims prepared under the authority of the Court. Some of these scheduled creditors had been paid their dividend prior to this order of 1888, some subsequent to the order, while some have neglected or been unable to draw the dividends to which they were entitled.

An application is now made to declare a final dividend, with a direction to the liquidator to pay into Court out of the moneys collected by him under the Winding-up Act the sum of \$682.55, to make good the shortage caused by the taking of this sum of \$1,047.49 from the specially charged funds on government deposit account of these unpaid creditors, but practically to make good the interest on those moneys that ought to have been in Court for the scheduled creditors who have not received their dividends.

Under the Winding-up Act, and the decisions interpreting it, it has been held that creditors whose debts carry interest are only entitled to dividends on the amount due for principal debt and the interest thereon computed up to the date of the winding-up order, unless when there is a surplus after paying the creditors 100 cents on the dollar.

In the Warrant Finance Co.'s Case, L. R. 4 Ch. at p. 646. Sir C. J. Selwyn, L.J., said: "Justice requires that no person should be prejudiced by the accidental delay which, in consequence of the necessary forms and proceedings of the Court, actually takes place in realizing the assets; but that in the case of an insolvent estate all the money being realized as speedily as possible should be applied equally and ratably in the payment of the debts as they existed at the date of

the winding-up order. I therefore think that nothing should be allowed for interest after that date." Sir G. M. Giffard, L.J., concurred, and added that convenience was in favour of stopping all computations of interest at the date of the winding-up.

So in Hughes's Claim, L. R. 13 Eq. at p. 630. Wickens, V.-C., in commenting on the rule laid down by the Lords Justices, which he held to be absolutely binding on him, said: "The rule is this, that the winding-up order shall nullify as between the creditors all contracts for the payment of interest. But after all the creditors are paid their principal debts, it leaves the claim for interest to operate on any surplus." And he disallowed a claim for interest on payments made by a surety after the date of the winding-up order.

I need only refer further to the observations of Lord Chancellor Selborne in Black and Co.'s Case, L. R. 8 Ch. at p. 262, where he says that the hand (liquidator) which receives the money under the Act necessarily receives them as a statutory trustee for the equal and ratable payment of all the creditors.

In view of these decisions of the English Court of Appeal on an analogous statute, it is not competent, I think, for this Court to appropriate any part of the funds recovered by its process and under its jurisdiction to pay interest asked for on behalf of a few of the creditors of this company by the certificates of the accountant—practically to make the large body of creditors contribute of their money sufficient to pay to the few creditors named in the certificate a certain sum for interest on their respective dividends.

The funds at the credit of "Clarke v. Union Fire Insurance Company general assets account" may be transferred to the creditors' government deposit account, and the total amount of the combined funds with accrued Court interest will then be about sufficient to pay these creditors in full without interest.

HODGINS, MASTER IN ORDINARY.

APRIL 12TH, 1898.

MASTER'S OFFICE.

RE FARMERS' LOAN AND SAVINGS CO.

EX PARTE TOOGOOD.

Company—Winding-up—Application for Leave to Add Company as a Party to an Action against Directors for Misfeasance in Office.

An application by a shareholder in this company, under sec. 16 of the Dominion Winding-up Act, for leave to add the company as a party to an action on behalf of herself and other shareholders for indemnity and damages against the directors, trustees, managing agents, and auditors of the company, for issuing false reports and statements to the plaintiff and the other shareholders, the public, and the government, concerning the concerns and affairs of the said company, and for improperly paying dividends out of the capital of the company, when in insolvent circumstances, and for malfeasance, neglect of duty, breach of trust, and maladministration in their offices, and misapplication of funds, whereby the company became insolvent and the shares of the shareholders became worthless, and for an account, etc.

THE MASTER:—Section 16 is practically a statutory injunction prohibiting actions against a company in liquidation.

The action is one to which the creditors cannot be made parties; and to any moneys recovered therein for the breaches of trust charged the creditors have no claim.

In *Bank of Toronto v. Colbourn, Peterborough, and Marmora R. W. Co.* (affirmed on appeal, 10 O. R. 376), I held that the creditors of a company had no fiduciary right against its directors for certain breaches of trust. Such right is now extended to creditors by the Winding-up Act, and can only be enforced under sec. 83 of the Act.

In the jurisdiction conferred upon this Court for the winding-up of insolvent companies, some special features may

be noted: (1) The Court initiating the winding-up proceedings becomes a Dominion Court *ad hoc*, whose order is enforceable in each provincial Court on the production of an office copy of such order to the proper officer of the Court required to enforce the same (sec. 85). See *Re Dominion Cold Storage Co. (Lowry's Case)*, 34 C. L. J. 164. And can restrain actions in the Courts of the other provinces which may affect the assets of the company. See *Baxter v. Central Bank*, 20 O. R. 214, and *In re International Pulp Co.*, 3 Ch. D. 594. (2) In winding up the financial affairs of an insolvent company, it has, in addition to its ordinary powers, a more comprehensive jurisdiction than the ordinary Courts, particularly in respect of the liabilities of shareholders on their shares and loans (secs. 42-55), the claims of creditors, and the assessment of damages (secs. 56-67), preferential liens (secs. 30, 56, and 66), fraudulent preferences (secs. 68-73), the rights of set-off (secs. 57 and 63), discovery (secs. 81, 82), compromises (secs. 33 and 61), sale of assets (secs. 30 and 31), dividends to creditors (secs. 65-67), the adjustment of the rights of shareholders *inter se* (sec. 51), and also the liability of past and present directors, managers, receivers, employees, or officers, under the following sec. 83:—
“When, in the course of the winding-up of a company under this Act, it appears that any past or present director, manager, liquidator, receiver, employee, or officer of such company, has misapplied or retained in his own hands, or become liable or accountable for, any moneys of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of any liquidator, or of any creditor or contributor of the company, notwithstanding that the offence is one for which the offender is criminally liable, examine into the conduct of such director, manager, liquidator, receiver, officer, or employee, and compel him to repay any moneys so misapplied or retained, or for which he has become liable or accountable, together with interest, at such rate as the Court thinks just, or to contribute such sums of money to the assets of the company by way of compensation in respect of such misapplication, retention, misfeasance, or breach of trust, as the Court thinks fit.”

These references indicate that the Court is constituted a *forum domesticum* for all matters affecting the financial affairs of the insolvent company; and this is borne out by the

following observations of Sir G. M. Giffard, L.J., in *Stringer's Case*, L. R. 4 Ch. 493: "I think these clauses (sec. 165, amended by 53 & 54 Vict. ch. 63, sec. 10, to include 'promoters') were introduced in order that by means of proceedings under the Act, without any double process or double set of proceedings, complete justice might be done between the parties, and a complete winding-up effected; and I think the instances are rare in which the jurisdiction ought not to be exercised. No doubt there are some cases (as where you have parties some of which are not amenable to the jurisdiction of winding-up, and it is not right and just to have piece-meal litigation), when it is proper that a bill should be filed. There may be also some very rare instances where it may be necessary to have the facts stated upon the record; but wherever upon notice of motion, and upon affidavit, and upon due examination of witnesses, you can properly arrive at a conclusion, I can see no reason whatever why a bill should be filed. It only adds to the expense; for upon notice of motion and affidavits and examination of witnesses, complete justice can be done, the evidence can be taken under the winding-up just in as many ways as it can be taken upon bill filed; and, what is more important, there are the same means of hearing in the Court below, and the same means of appeal to this Court and to the House of Lords. Therefore I see no reason why any narrow construction should be put upon the Act, and I think it would be to the disadvantage of the public that a narrow construction should be put upon it."

In *Rance's Case*, L. R. 6 Ch. at p. 114. the Lords Justices held that in the above the law had been laid down clearly, distinctly, and, in their judgment, decisively. In *Cardiff Coal and Coke Co. v. Norton*, L. R. 2 Ch. 405, it was held that when a company is being wound up under the Companies Act, the proper mode of recovering its assets is by a proceeding under the winding-up, and not by an action. And in *Re Kingston Cotton Mill Co.*, [1896] 2 Ch. 279, it was held that where an officer of a company committed a breach of his duty for which he could be made responsible in an action, he should be proceeded against under the Act, and not in an action.

And the present Master of the Rolls (Lindley) in his work on Joint Stock Companies, says that if the claim sought to be enforced in an action is capable of being satisfactorily

disposed of in the winding-up proceedings, such action will be stayed (p. 674). For liquidation proceedings are analogous to administration proceedings: *Re Life Association*, 10 L. T. N. S. 833, 34 L. J. Ch. 64.

In prosecutions for offences the Crown does not allow the private prosecutor to assume its responsibility in such prosecutions. Nor should this Court except for cause allow a private prosecutor to relieve its officer who has given security as liquidator, of his statutory responsibility under the section referred to, and intrust the collection of a portion of the trust funds to a private litigant.

If it would be proper to relax the statutory injunction in favour of this shareholder, on what grounds could it be refused to each of the several hundred shareholders of this insolvent company? For each of them may claim a similar right and may prosecute his action as he thinks proper, until a plaintiff in one of these class actions, on behalf of shareholders, obtains a judgment. See *Handford v. Storie*, 2 S. & S. 196.

Lord Romilly, M.R., has graphically pictured the spectre of a legal Briareus hurling (not rocks, but) 200 or 300 law suits on a liquidator to the damage of the assets of the estate: see 20 L. T. N. S. 840. And he might have added as a legend Lord Coke's maxim, "The law will sooner tolerate a private loss than a public evil."

In the *Central Bank* case (*Ex p. Henderson*), after the claims of creditors had been practically paid in full, I allowed,—the liquidator not opposing,—more as a matter of caution, than as a right, a shareholder to join the bank as a formal party to an action, intimating however that actions against directors for personal wrongs did not require the leave of the Court. For it is a doctrine of equity that no one ought to be a party to an action merely as a witness for discovery, who has no other apparent interest in it. See *Calvert on Parties*, pp. 90-91; *Re New Zealand Banking Corporation*, 21 L. T. N. S. 481, 39 L. J. Ch. 128; and *Hall v. Old Talargoch Mining Co.*, 3 Ch. D. 749.

As the liquidator has intimated his intention of proceeding against the directors and officers under sec. 83, and as the general practice of the English Court under a similar Act is

as stated by the present Master of the Rolls, I see no ground for relaxing the statutory injunction, and allowing this shareholder to bring an action against the directors and officers for misfeasance and breach of trust—claims which are capable of being more satisfactorily disposed of by the Court here; and therefore so much of her present application must be refused. And as to any action she may bring for a personal wrong, no leave is necessary, for the assets of this insolvent company would not be benefited or affected by the financial results of such litigation.

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No. 2

FALCONBRIDGE, C.J.

JUNE 11TH, 1906.

WEEKLY COURT.

RE JANSEN.

Life Insurance — Change in Beneficiary — “Instrument in Writing”—Incomplete Will—Operation of—Insurance Act.

Motion by Mary S. Jansen, widow of W. Jansen, deceased, for payment out of Court of the amount paid in by a benefit society, being the fruits of a policy or certificate upon the life of the deceased, of which she was the beneficiary. The motion was opposed by the 5 children of deceased, who claimed under an alleged will varying the designation of beneficiary and apportioning the amount among wife and children.

W. B. Laidlaw, for the widow.

A. G. F. Lawrence, for the 5 children of deceased.

FALCONBRIDGE, C.J.:—The Grand Lodge of the Ancient Order of United Workmen issued a beneficiary certificate to the deceased in 1879, for \$2,000, to be paid at his death to his wife. Jansen died on 27th June, 1905, leaving him surviving his widow and 5 children. On 16th June he had executed a document with the intention of making a last will and testament, but the persons who subscribed their names as witnesses were not both present at the same time, nor did they subscribe their names as witnesses in the presence of each other; so that the document cannot be proved as a will.

The question for determination is whether this document, which was intended to operate as a will, and which is wholly

invalid as such, can be treated as an "instrument in writing" under the Insurance Act, R. S. O. 1897 ch. 203, sec. 160, sub-sec. 1.

The point is, I think, a new one. . . . I was not referred to any authority expressly in point.

In *Kreh v. Moses*, 22 O. R. 307, the person who would have benefited by the writing was not one of the class known as "preferred beneficiaries:" sec. 159. But I think the principle is the same. The deceased did not intend to execute an instrument in writing to transfer the benefits of the policy inter vivos. His intention was to make a will, and he failed to make a valid one. I am therefore of opinion that the paper in question is not an instrument in writing which is effectual to vary the benefit of the certificate. To hold otherwise would, I think, be to defeat the statute prescribing how a will shall be executed.

The widow is, therefore, entitled to the fund in question. I think it is a case for directing costs to all parties to be paid out of the fund.

I refer also to *Re Hughes*, 36 W. R. 821, and to *Long's Appeal*, 86 Pa. St. R. 196, 204.

ANGLIN, J.

JUNE 12TH, 1906.

TRIAL.

CRONKHITE v. IMPERIAL BANK OF CANADA.

Landlord and Tenant—Vault Door Placed on Demised Premises by Tenant—Annexation to Freehold—Fixture—Removal after Expiry of Term—Waste—Damages.

Action by the owner of a building in the city of Niagara Falls for damages for alleged waste committed by the defendants, tenants of a portion of the building, by removing the door of a vault used by them for banking purposes in the leased premises.

F. W. Griffiths, Niagara Falls, for plaintiff.

A. Fraser, Niagara Falls, for defendants.

ANGLIN, J.:—In 1896 plaintiff's predecessor in title, Alice Howard, leased to defendants the western store in the building known as "Howard's Block." The lessor constructed in the interior of the leased premises a vault of brick and masonry. The lessees provided a metal lining for this vault, which was secured by bars sunk into the masonry of the vault. At the doorway of the vault to this metal lining, upright pivots or staples of metal were affixed, upon which it was intended to hang or suspend the vault door. This door, with an expensive combination lock, the whole costing \$500, was procured by the lessees, and hung upon the pivots or staples prepared for it. When open, its own weight and the support of the staples on which it hung, kept it in position. When closed and locked, it was held in place not only by the staples but also by the bolts, which the action of the lock drove into recesses in the masonry, or the metal casing prepared to receive them.

In 1890 defendants leased the corner or eastern shop of the block from Alice Howard for a term of 10 years from 1st April, 1890. The landlady constructed a new brick vault in this shop, and the tenants supplied the metal lining for it. The vault door was removed from the vault in the western shop, and hung upon the new vault in the corner shop, in the same manner as it had formerly been hung upon that in the western shop.

The lease of 1890 contains no reference to fixtures except in the covenant to leave the premises in good repair, etc. There is no evidence of any express agreement at any time between the lessor and the lessees about the ownership of the vault door; no evidence that anything whatever was said about it by one or the other of them. But there certainly was some understanding that the lessees should furnish this door.

On 10th November, 1899, the bank took a new lease of the corner premises for a further term of 5 years from 1st April, 1900, from James Dickenson, a grantee from Alice Howard. This lease contains the usual covenant by the lessee to leave the premises in good repair, etc., and a proviso "that the lessee may remove its fixtures," but makes no reference, by recital or otherwise, to the preceding lease of 1890, except in the description of the premises as "now occupied by the said lessee as a bank."

On 10th November, 1904, a further lease was taken by the bank, for a term of 18 months, to be computed from 1st

April, 1905, which contains covenants and provisoes similar to those in the lease of 1900, and the following special clause: "It is further expressly agreed between the parties hereto that, in consideration of the granting of this lease, the extension of the lease heretofore entered into between the said parties, dated the 10th day of November, 1899, is hereby surrendered."

What were the rights and relative positions of the parties between 10th November, 1904, and 1st April, 1905, is not now material; but it may be noted that the lease of 1899 is here spoken of as "an extension of lease."

James Dickenson, after executing the lease of November, 1904, conveyed to the plaintiff, subject to the tenancy of the Imperial Bank.

The lessees were still in actual possession of the premises when, in February, 1906, they took off the vault door in question and removed it to another building owned by themselves. A demand by the plaintiff for its return was refused. The present action ensued.

The parties agree that, if plaintiff is entitled to recover, the damages shall be assessed at \$500; and that, as an alternative to paying that sum, defendants may restore the door in question to plaintiff. Plaintiff abandons all claim to any other relief in this action.

It was argued by Mr. Fraser, for defendants, that the provisoes in the leases of 1899 and 1904, which expressly reserve to the lessees the right to remove fixtures placed by them upon the premises, include this fixture, if it be such. In that view I cannot agree. These provisoes are, in my opinion, restricted in their operation to fixtures placed upon the premises by the lessees subsequent to the respective dates of these demises and to other fixtures, if any, then upon the premises which the parties might agree should be deemed lessees' fixtures.

Neither can I treat the leases of 1899 and 1904, as contended for by Mr. Fraser, as mere extensions of or excrescences upon the original lease of 1890. Even if the special clause in the lease of 1904 above quoted would support that contention as to the lease of 1899, it is wholly destructive of Mr. Fraser's argument when applied to the lease of 1904, under which defendants were in possession at the time of the commission of the alleged waste.

The question to be determined, therefore, is whether the lessees, in possession under the lease made in 1904, had the right to remove the vault door which they had, as tenants under an earlier lease, supplied and placed upon the premises. I shall assume that, if still in possession under the original lease of 1890, they would have the right to remove the door, though a fixture. The right of a tenant as against his landlord to remove his trade fixtures during the term, though affixed to the freehold more firmly than was this door, is well established. I refer only to some of the more recent decisions: *Mears v. Callander*, [1901] 2 Ch. 388, citing, with full approval, *Penton v. Robart*, 2 East 88; *In re Hulse*, 74 L. J. Ch. 246; *Argles v. McMath*, 26 O. R. 224, 18 A. R. 44.

This vault door was brought upon the premises to meet the business requirements of the bank. It was hung upon the pivots that it might serve the purpose for which it was designed. Its removal entails no injury whatever to the freehold. It can, when removed, be used elsewhere just as it was used upon the premises of plaintiff. The circumstances do not indicate that the bank intended that this door should become permanently a part of the freehold. It would seem not unreasonable that, if a fixture at all, it should be deemed a tenant's trade fixture and as such removable. Such I assume it to have been.

But the authorities are uniform that tenant's fixtures are removable only during the term or some further period of possession by the tenant, during which he holds the premises under a right still to consider himself a tenant, or during what has been called an excrescence upon or an enlargement of the term.

Either in 1899 or in 1904, probably in both years, there was a surrender by the lessees of the terms then respectively about to end. During the original term the door in question, if a fixture, was part of the freehold, subject, I assume, to the tenants' right of removal: *Scarth v. Ontario Power and Flat Co.*, 24 O. R. 446, 451. That right of removal ceased with the surrender—whether by express agreement or by operation of law—of the term in respect of which it existed. Under a new lease taken by a tenant, in the absence of special agreement to the contrary, things remaining affixed to the freehold, though theretofore his removable fixtures, are demised to him as part of the premises owned by the landlord: *Sharp v. Milligan*, 23 Beav. 419; *Pronguey v.*

Gurney, 36 U. C. R. 53, 57, 37 U. C. R. 347, 356. If then, as between the landlord and the tenants, this vault door, upon its being placed in position, became a fixture, though removable by the tenants during the term, it has become the property of the landlord, and its removal in February last by the tenants was unlawful.

But did the vault door ever become a fixture at all? As between the lessor and defendants there are some circumstances which seem to indicate an intention that it should remain a chattel and should not become a fixture. Are they sufficient to warrant a finding that there was a tacit understanding or implied agreement to that effect?

The fact that the landlord, though building the masonry of the vault at his own expense, was not required by the lessees to provide the metal lining and vault door is in itself significant. When it is remembered that this special and expensive door with combination lock, requisite for the business of a bank, would probably be unnecessary for the business of other future tenants of the premises and to some tenants might be a distinct drawback, that while of great value to the bank it might very slightly enhance the value of the freehold if retained after the premises had ceased to be used as a banking house, there would at first blush seem to be strong reasons for the belief that the parties intended that it should remain a chattel. But there is no evidence that the landlord may not have contemplated leasing these premises in the future to other tenants to whom a vault equipped with such a door would be an inducement, if not a necessity. Again, there is no evidence of the rental value of the premises, and it is impossible to say that the rent of defendants was not materially reduced because of the prospective acquisition by the landlord of this valuable vault door. Though rather indicative of an intention that the door should remain a chattel, the circumstances are not inconsistent with an intention that the door should become a fixture, removable it may be, but nevertheless a fixture, and do not, in my opinion, suffice to sustain an inference that, between Alice Howard and the Imperial Bank, there was an agreement or understanding that this door should retain the character of a chattel. Neither is there evidence of any custom that such doors, when placed by banks on rented premises, are deemed chattels as between them and their landlords. Such a custom, if its existence were satisfactorily shewn, and

knowledge of it by the parties proven, might have justified an inference that the lease in question was made subject to it: *Trappes v. Harter*, 2 C. & M. 153. I find no solid ground upon which to rest any implied agreement between the parties as to the character of the door in question. . . .

[Reference to *Reynolds v. Ashby & Son*, [1904] A. C. 466, 473.]

The rule laid down by Blackburn, J., in *Holland v. Hodgson*, L. R. 7 C. P. 328, at p. 335, has been so often affirmed by the highest authority that it admits of no question. It is stated in these terms: "Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to shew that they were intended to be part of the land, the onus of shewing that they were so intended lying on those who assert that they have ceased to be chattels; and that, on the contrary, an article which is affixed to the land, even slightly, is to be considered part of the land, unless the circumstances are such as to shew that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel. This last proposition seems to be in effect the basis of the judgment of the Court of Common Pleas delivered by Maule, J., in *Wilde v. Waters*, 16 C. B. 637. This, however, only removes the difficulty one step, for it still remains a question in each case whether the circumstances are sufficient to satisfy the onus."

Where there is some annexation, the mode and degree as well as the object of such annexation, the ease or difficulty in detaching the article without injury to itself or to the freehold, and whether the purpose be to use the thing as "accessory to a matter of a personal nature" or to use it "to improve the inheritance," must largely determine the effect to be given to such annexation, from which, in the absence of evidence of agreement, the intention of the annexation must be deduced. . . .

[Reference to *Stack v. Eaton*, 4 O. L. R. 335, 338, 1 O. W. R. 511; *Hobson v. Gorringer*, [1897] 1 Ch. 182, 193.]

I have carefully read and considered *Lancaster v. Eve*, 5 C. B. N. S. 717; *Wood v. Hewett*, 8 Q. B. 913; *Mant v. Collins*, 5 Q. B. 916; *Ex p. Ashbury*, L. R. 4 Ch. 630; *Childley v. Churchwardens of West Ham*, 32 L. J. 486; *Liscombe Falls Gold Mining Co. v. Bishop*, 35 S. C. R. 539; and many other cases in which articles annexed to the free-

hold were held to have remained chattels. None of them is decisive of the present case.

This vault door is affixed, slightly it may be, to the land. It is not attached merely by its own weight. Therefore, the onus of shewing it to be a chattel and not a fixture rests upon the defendants. While the mode and degree of the annexation, because it is so slight and because the door can be removed without injury to itself or to the freehold, may not be inconsistent with its retaining the character of a chattel, can it be said that the object of the annexation was aught other than to render the vault (admittedly part of the freehold) serviceable to defendants as tenants of the shop for the purpose for which it was intended? . . .

[Reference to *Wake v. Hall*, 8 App. Cas. 195, 204.]

Here the mode and degree of annexation are at best inconclusive; the object of the annexation, on the other hand, "patent to all to see," was the improvement of the inheritance—the completion of the vault—at all events during the tenancy of defendants. This, I think, sufficed to make of the vault door a fixture, removable it may be as a tenant's fixture, but, while affixed to the freehold, part and parcel thereof, subject to any such right of removal.

Defendants have failed to discharge the onus of shewing that this door, annexed to and apparently part of the freehold, retained its chattel character. They did not preserve any right of removal which may originally have been incidental to it as a tenant's fixture. The title of plaintiff is, therefore, upon the admitted facts, established, and he must have judgment in the terms agreed upon, and as well for the costs of this action.

JUNE 12TH, 1906.

DIVISIONAL COURT.

VOKES HARDWARE CO. v. GRAND TRUNK R. W. CO.

Mechanics' Liens—Time for Registering Lien—Completion of Work—Contract—Work to be Done to Satisfaction of Architects—Work Done after Registration of Lien—Form of Judgment—Money in Court—Reference—Costs.

Appeal by defendant Whitham from judgment of MULLOCK, C.J., 7 O. W. R. 537.

R. McKay, for appellant.

J. W. St. John, for plaintiffs.

THE COURT (MEREDITH, C.J., TEETZEL, J., ANGLIN, J.), affirmed the judgment, with a variation agreed to by counsel, to the effect that the declaration of plaintiffs' lien in the formal judgment be struck out, and that the amount which shall be found by the Master to be due to plaintiffs be paid out of the money in Court. No costs of the trial or of this appeal. Further directions and other costs reserved to be disposed of by a Judge in Chambers after the Master's report.

ANGLIN, J.

JUNE 13TH, 1906.

TRIAL.

ELLIS v. NORWICH BROOM AND BRUSH CO.

Company—Sale of Assets by Directors to Managing Director—Action to Set aside—Direction to Hold Meeting of Shareholders to Ratify or Disapprove Sale.

Action to set aside as ultra vires and improper a sale by the directors of the defendant company of all the assets to the defendant Dougherty, managing director of the company.

R. N. Ball, Woodstock, for plaintiff.

J. G. Wallace, Woodstock, for defendant.

ANGLIN, J.:—Had this sale been to a stranger, I do not think the right of the directors to make it could be successfully challenged: *Wilson v. Miers*, 10 C. B. N. S. 348; *Whiting v. Hovey*, 14 S. C. R. 515, 13 A. R. 7. But, as a sale by the trustees to one of themselves, its validity is certainly open to question. Upon the evidence it is impossible to find that this sale was ever sanctioned by the shareholders. Yet it is reasonably clear that, if it should now be set aside, the shareholders would themselves immediately take steps to effect a similar sale to defendant Dougherty. Of their power to make such a sale there can be no question. It therefore seems proper before disposing of this action to direct that a meeting of the shareholders may be called for the consideration of the sale to Dougherty effected by the directors, and that they be asked to ratify it or express their disapproval of it: *Bainbridge v. Smith*, 41 Ch. D. 462; *Pender v.*

Lushington, 6 Ch. D. 70, 79-80. Should they ratify it, it is obvious that a judgment for plaintiff in this action would be of no avail. Should they disapprove, such a judgment may be necessary to preserve substantial rights. A special meeting of the shareholders may accordingly be called by the directors for 27th June, 1906. Due notice should be given of the time, place, and purpose of this meeting to all persons who are now or who were shareholders on the 1st and 3rd February, 1906. The president of the company may report fully to the registrar upon affidavit the results of such meeting. This action will then be disposed of.

JUNE 13TH, 1906.

DIVISIONAL COURT.

CHAMBERS v. JAFFRAY.

Discovery — Libel — Examination of Defendant — Answers Tending to Criminate—Privilege — Evidence Act — Rule 489.

Appeal by defendant R. M. Jaffray from order of MULLOCK, C.J., 7 O. W. R. 371, requiring the appellant to attend, at his own expense, and answer certain questions which had been put to him on his examination for discovery, and which he had refused to answer, on the ground that his answers to them would tend to criminate him, and all other lawful questions which might be put to him on such examination, and that in default of his doing so a writ or writs of attachment should be issued against him.

The appeal was heard by MEREDITH, C.J., BRITTON, J., MAGEE, J.

R. McKay, for appellant.

J. B. Clarke, K.C., for plaintiff.

MEREDITH, C.J.:—The action is for libel, and the principal question raised upon the appeal is as to the application of the provisions of sec. 5 of the Ontario Evidence Act, as

enacted by sec. 21 of the Statute Law Amendment Act, 1904, to examinations for discovery.

But for the provisions of Con. Rule 439, as enacted by Con. Rule 1250, I should have doubted whether sec. 5 is applicable to examinations for discovery.

Con. Rule 439 is as follows: "439. A party to an action or issue, whether plaintiff or defendant, may, without order, be orally examined before the trial touching the matters in question, by any party adverse in interest, and may be compelled to attend and testify in the same manner, upon the same terms, and subject to the same rules of examination of a witness except as hereinafter provided." It is quite clear that upon the trial of the action sec. 5 would be applicable, and the appellant would not be excused from answering.

This Rule, in my opinion, therefore, puts a party on his examination for discovery, as far as the question under discussion is concerned, in the same position as he would be in if he were being examined as a witness at the trial, and he is therefore not excused from answering any question that is properly put to him, upon the ground that the answer to it may tend to criminate him, and if he objects to answer on that ground his answer is within the protection of sec. 5. This is secured to him by the words of the Rule "testify in the same manner, upon the same terms, and subject to the same rules of examinations of a witness."

A minor question raised by the appeal was dealt with on the argument.

The order will, therefore, be varied, as to the minor question, by providing that the appellant is not to be required to answer as to the person or persons under whose instructions the alleged libel was written, except such as are parties to the action; and with this variation the order will be affirmed and the costs of the appeal will be costs in the cause to plaintiff.

BRITTON, J., and MAGEE, J., gave written reasons for the same conclusion, both referring to *Regina v. Fox*, 18 P. R. 343, as governing this case.

JUNE 14TH, 1906.

DIVISIONAL COURT.

LIFE PUBLISHING CO. v. ROSE PUBLISHING CO.

Copyright—Infringement—Drawings in Serial Publication—British Registration—First Publication—Imperial Copyright Acts—Employment of Author by Publisher—Foreign Author Resident outside of British Dominions—Title to Copyright—Assignment—Contract—Publication by Author under License—Infringement by Copying—Delivery up of Infringing Copies.

Appeal by defendants from judgment of TEETZEL, J., 7 O. W. R. 337.

J. H. Denton, for defendants.

H. Cassels, K.C., and R. S. Cassels, for plaintiffs.

The judgment of the Court (MEREDITH, C.J., BRITTON, J., MAGEE, J.), was delivered by

MEREDITH, C.J.:—I am of opinion that the judgment of my brother Teetzel is right and should be affirmed.

That the effect of the arrangements between the plaintiffs, Messrs. Mitchell and Miller, and Mr. Gibson, was to vest in plaintiffs the property, or, as it is sometimes called, the common law right to copyright, in the drawings which were produced by Mr. Gibson for plaintiffs, does not, in my opinion, admit of any doubt. Apart from the right of plaintiffs arising from the employment and payment by them of Mr. Gibson for his services in the preparation of the drawings, the agreements expressly provide that plaintiffs shall have the right to copyright them "in such name or names" as they may see fit: see agreement of 16th November, 1899.

It is also clear, I think, that this common law right was, by the agreements between plaintiffs and James Henderson, validly transferred by plaintiffs to Henderson for the purpose of the reproduction by him of the drawings and letter press as they were to appear in plaintiffs' publication "Life," in Henderson's periodical called "The Comic Pictorial Sheet," the publication in both periodicals appearing simultaneously, the former in New York and the latter in London,

and by the agreement of 16th November, 1899, Mr. Gibson recognized and confirmed this right of Henderson under his agreement with plaintiffs.

The drawings which are alleged to have been pirated by defendants were prepared by Gibson under the provisions of these agreements, and were first published in America by plaintiffs in their periodical "Life," and appeared simultaneously in England and America, if not a few hours earlier in Henderson's periodical "The Comic Pictorial Sheet," which was the first publication of them in the British dominions.

Henderson was, in my opinion, an assign of the author of these drawings within the meaning of sec. 3 of the Copyright Act 4 & 5 Vict. ch. 45 (1842), and "The Comic Pictorial Sheet" was a book within the meaning of that section (see sec. 2), and it follows that under the provisions of sec. 3 he became entitled to statutory copyright in the drawings as part of his book: *Maple v. Junior Army and Navy Stores*, 21 Ch. D. 369; *Comyns v. Hyde*, 72 L. T. 250.

It was contended by Mr. Denton that statutory copyright in drawings was regulated by 25 & 26 Vict. ch. 68 (1862), and not by the Act of 1842; but *Maple v. Junior Army and Navy Stores* shews that, while they may be so as regards drawings simpliciter, when drawings form part of a book they come within the provisions of the Act of 1842.

It was also argued by Mr. Denton that, even if that be the case, drawings are protected only as forming part of a book, and that, if not entitled to copyright as drawings simpliciter, any one may reproduce them, and that defendants, having copied from a set of Mr. Gibson's drawings published in the British dominions, had not infringed plaintiffs' copyright.

Bradbury v. Hotten, L. R. 8 Ex. 1, is, however, a clear authority against the proposition . . . for, as in that case the caricatures in "Punch" which the defendants had republished for the same purpose as they were originally published, namely, to excite the amusement of his readers, so in this case the purpose of the publication in "The Comic Pictorial Sheet" and that by the defendants were the same.

Mr. Denton likened the case to that of an engraving from a picture, the engraving being protected by copyright, and, argued that, as in such a case it is no infringement of the engraver's copyright to make another engraving from the

same picture, so in this case it was not an infringement to make a copy from the original drawing or from a copy of it published by the artist himself. The cases are, however, entirely different. In the case of the engraving there is no copyright in anything but the engraving, while in such a case as this the drawings form part of a book, every part of which is protected by copyright, and by sec. 15 of the Act of 1842 the printing of any book, which includes, according to the definition of a book given in sec. 2, every part of it, and therefore illustrations in it, is an infringement of the copyright in the book: *Cate v. Devon and Exeter, etc., Co.*, 40 Ch. D. 500, 505-6; *Copinger on Copyright*, 4th ed., pp. 193-4.

Objection was taken to plaintiffs' title to the copyright, which they claim to have acquired by re-assignment from Henderson. It was said that an assignment from Henderson to James Henderson & Sons, who are the immediate assignors of plaintiffs, was not shewn to have been made. To this objection there are two answers, first, that there is nothing to impeach the *prima facie* right shewn by the certificate of the registering officer appointed by the Stationers Company, put in at the trial, and the other that if, as was practically conceded to be the fact, Henderson was a member of the firm of James Henderson & Sons, the assignment of the firm operated to pass his right in the copyright.

I entirely agree in the view of my brother Teetzel that the objection that Gibson was an alien is not entitled to prevail, and have nothing to add to what he has said as supporting that view, except to point out that since his judgment was given there has been added to the mass of opinion supporting it the opinion of a distinguished legal author and commentator (Sir Frederick Pollock.) See preface to vol. 80 of the *Revised Reports*.

An objection was taken to the form of the judgment which has been entered, the contention of defendants being that, inasmuch as they had made the copies in respect of which the action is brought before plaintiffs were registered as proprietors of the copyright, the judgment should not have required the delivery up of the infringing copies.

The objection is not taken in the notice of appeal, but, if open, is not, in my opinion, well taken. Section 23 of the

Act of 1842 entitles plaintiffs to that relief: *Isaacs v. Fiddeman*, 49 L. J. Ch. 412; *Boosey v. Wright* (No. 2), 21 L. T. 265.

Appeal dismissed with costs.

GARROW, J.A.

JUNE 14TH, 1906.

C.A.—CHAMBERS.

LONDON AND WESTERN TRUSTS CO. v. LAKE
ERIE AND DETROIT RIVER R. W. CO.

Appeal to Supreme Court of Canada—Extension of Time for giving Notice of Appeal—Intention to Appeal—Special Circumstances—Merits.

Motion by defendants for an order extending the time for serving notice of appeal to the Supreme Court of Canada from the judgment of the Court of Appeal (7 O. W. R. 511), and for giving the necessary security, and otherwise perfecting the appeal.

Britton Osler, for defendants.

C. A. Moss, for plaintiffs.

GARROW, J.A.:—Judgment was delivered by this Court on 28th March, 1906, and the 20 days allowed for giving notice under sec. 41 of the Supreme Court Act therefore expired on 17th April. It is conceded that the case was one requiring notice to be given under that section. But no notice was served, because, it is said by way of explanation, the necessity for the notice was overlooked.

The 60 days allowed by sec. 40 expired on 27th May. On 25th May notice of this motion was served returnable on 28th May, and upon its return an adjournment took place until 9th June, when it was argued.

Section 42 provides for this Court or any Judge thereof allowing an appeal, although not brought within the time prescribed, "under special circumstances."

What should be shewn by way of special circumstances to bring the case within sec. 42? Each case must . . .

necessarily depend very much upon its own facts; but here and there are to be found in the reported decisions definitions which are, at least, useful as guides towards a proper and as far as possible uniform conclusion. . . .

[Reference to *Smith v. Hunt*, 5 O. L. R. 97, 1 O. W. R. 798; *Rowlands v. Canada Southern R. W. Co.*, 13 P. R. 93; *Ross v. Robertson*, 7 O. L. R. 464, 3 O. W. R. 513.]

In this case I am not satisfied, upon the material before me, that there was, at any time within the 20 days after the judgment was pronounced, a bona fide intention to appeal. In a letter produced, written by a member of the firm of solicitors for defendants, to plaintiffs' solicitors, there is a statement that they were then still considering the question. The date of this letter is 24th April, or a week after the expiry of the 20 days.

It is unnecessary to say anything about the merits of the appeal, which is an appeal from the unanimous judgment of this Court, further than this, that I am not impressed that it would be in the interests of justice, that is, justice to both parties, to grant the leave, and as, in my opinion, no special circumstance has been shewn, my duty is to refuse it.

Motion dismissed with costs.

JUNE 14TH, 1906.

DIVISIONAL COURT.

HEATH v. HAMILTON STREET R. W. CO.

Negligence—Injury to Person Bicycling by Overtaking Street Car—Unusual Position of Car—Speed—Defect in Fender—Failure of Plaintiff to Look behind—Contributory Negligence—Proximate Cause of Injury—Case for Jury—Motion for Nonsuit.

Appeal by defendants from judgment of MABEE, J., 7 O. W. R. 459.

E. E. A. DuVernet, for defendants.

G. S. Kerr, Hamilton, for plaintiff.

THE COURT (MEREDITH, C.J., TEETZEL, J., ANGLIN, J.), dismissed the appeal with costs.

CARTWRIGHT, MASTER.

JUNE 15TH, 1906.

CHAMBERS.

RE ELGIE, EDGAR, AND CLEMENS.

Interpleader—Application for Order—Stakeholder—Chattel Mortgage—Surplus in Hands of Mortgagee—Claim Under Order for Payment of Part of Surplus—Claim under Purchase from Mortgagor.

Motion by Elgie & Co. for an interpleader order in respect of a sum of \$730.44.

John Wood (Arnoldi & Grierson), for applicants.

J. A. Scellen, Berlin, for claimant Clemens.

T. E. Godson, Bracebridge, for claimant Edgar.

THE MASTER:—The facts appearing from the material are as follows. In September last one Sieling gave to the applicants a chattel mortgage on certain logs and lumber to secure \$4,200 with interest. This was to be paid by the lumber.

On 1st February Sieling gave Edgar an order for \$400 on the applicants. Edgar notified them on 6th March, and on 10th March the applicants answered as follows: "We received the order signed by Mr. Sieling to pay you \$400. We are not yet paid off ourselves on Mr. Sieling's account; however, we will apply the surplus on account of this order as soon as we clear ourselves."

On 2nd April the applicants were notified by Clemens that Sieling had sold to him all his interest in the lumber in question, subject to their chattel mortgage, and that "all surplus moneys after payment of your mortgage must be paid to me. I am quite prepared to carry out any arrangement for the sale of this lumber to you on the above conditions."

For some reason the applicants made no reply. The purchaser Clemens states in his affidavit that about 14th April he saw the applicants' manager at his office in Toronto, and was then informed of certain orders given by

Sieling, and that his company had not accepted the same, as there was then no money in their hands belonging to Sieling; "that all shipments of lumber had been applied on account of their mortgage, on which there was due at the date of my purchase from Sieling \$796.70." The mortgage, it is admitted, has been paid off, and Clemens further states that the \$730.44 are proceeds of his lumber.

This affidavit of Clemens is not in any way impeached by the applicants, who do not seem to have acted wisely in this matter. They were under no obligation to give any acceptance of the order in Edgar's favour. This was the initial cause of their present difficulty. From this they cannot be relieved to the prejudice of Clemens, who was admittedly a purchaser for value without notice of Edgar's claim.

Further, the applicants did not act wisely or fairly with Clemens. They sent no acknowledgment of his notice that he had bought out Sieling subject to their chattel mortgage. If they were intending to protect themselves against Edgar's claim (assuming that they could then have done so), they should at once have notified Clemens of this fact. Not having done this, they must be considered to have assented to his statement as to what was due them, according to the principle of *Wiedeman v. Walpole*, [1895] 2 Q. B. 534, a judicial affirmation of the familiar saying, "Silence gives consent." This is also consistent with the statement in Clemens's affidavit that the manager told him that Sieling had given orders on them, but that the company had not accepted them. No doubt, the applicants think they are in danger of attack from Edgar or Clemens. But this does not necessarily entitle them to interplead. See *Re Smith and Bennett*, 2 O. W. R. 399, and cases cited.

So far as appears, there is no ground on which the order can be made. At the time when Sieling conveyed to Clemens there was still nearly \$800 due on the chattel mortgage, and there was therefore nothing applicable to Edgar's order. This would be a conclusive answer to any issue between Edgar and Clemens. He might have taken security from Sieling for his claim, and he must now recover against him if he can. The applicants said to him no more than this, that if they had in their hands anything due Sieling, when their mortgage was paid off, they would apply it on this order to Edgar. But before that time arrived Sieling ceased

to be their customer, and so there never was anything due him after the mortgage was paid.

It was suggested at the argument that Clemens might have notice of Edgar's claim and have bought subject thereto. But there is no hint of this on the material, and, if it were the case, there should have been affidavits from Edgar and Sieling on this point. As none were submitted, it must be assumed that this was the fact.

All the other claimants withdrew, except Edgar and Clemens. In view of these numerous claimants, there seems to have been sufficient ground for the motion, so that, while I feel it necessary to dismiss it, such dismissal will be without costs.

JUNE 16TH, 1906.

C.A.

C. BECK MANUFACTURING CO. v. ONTARIO LUMBER CO.

Water and Watercourses—Logs Floated over Stream—Improvements—Use of—"Reasonable Tolls"—Action for—R. S. O. 1897 ch. 142—Restriction to Future Tolls—Foundation for Action—Order Fixing Tolls.

Appeal by plaintiffs from order of a Divisional Court (10 O. L. R. 193, 6 O. W. R.), affirming the judgment of MACMAHON, J., after the trial dismissing the action.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

W. R. Riddell, K.C., and F. E. Hodgins, K.C., for plaintiffs.

A. B. Aylesworth, K.C., and A. G. F. Lawrence, for defendants.

Moss, C.J.O.:—Upon the argument of the appeal a number of questions were discussed which appear to me not to have any bearing upon the real question to be determined in this action.

Two orders made by the Judge of the District Court of Nipissing, under sec. 13 of the Rivers and Streams Act, R. S. O. 1897 ch. 142, were much canvassed; and their effect

upon plaintiffs' rights in this action was discussed at some length. But in truth plaintiffs' action is not founded to any extent whatever upon these orders, or either of them. Indeed, as will be seen by reference to the statement of claim, they are entirely ignored, and, although at the trial the earlier order appears to have been put in by plaintiffs' counsel, he only did so because, as he explained, a reference was made to it in the course of the evidence. The other and later one, of 30th March, was also put in by plaintiffs at a later stage of the case, but at the instance apparently of defendants.

The statement of claim sets forth that plaintiffs, in the carrying on of their business as lumbermen, found it necessary to use the stream known as "Post creek" for floating down their logs and timber, and the stream in its natural state not being navigable or floatable for saw logs or timber, plaintiffs made and maintained and kept in repair certain constructions and improvements in and on the creek, consisting of dams, slides, piers, booms, and other necessary works, in respect of which plaintiffs expended . . . \$8,580.94.

It is then alleged that defendants, having prior to 1903 cut certain saw logs and timber in or near the works and improvements, prepared the same for transmission down the stream and through and over plaintiffs' improvements, but did not notify plaintiffs that they desired to use these improvements, so that plaintiffs might agree with them as to the rate of compensation for the use of the improvements or have the tolls fixed under the statute in that behalf, but, instead, proceeded to drive their logs down the creek and to use the improvements, and took part with the drive of plaintiffs, and afterwards alleged that plaintiffs hindered and delayed defendants' drive, and recovered damages to the extent of \$750 under the Saw Logs Driving Act, by reason of the alleged hindrance and delay. And plaintiffs say that there was an implied understanding and agreement on the part of defendants to pay a reasonable compensation for the use of the improvements. It is further alleged that plaintiffs permitted defendants to take part in the drive and utilize the improvements under such understanding and agreement, and that otherwise they would not have permitted the driving of plaintiffs' logs over the improvements

and constructions; and that defendants, in using the improvements, caused unnecessary damage thereto.

Plaintiffs' claim is that they are entitled to be paid by defendants reasonable tolls or compensation for the use of the construction and improvements by reason of an expressed or implied agreement to pay therefor, plaintiffs having changed their position to their detriment upon the faith of the same, or under or by virtue of the expressed terms and true meaning of the Act for protecting the public interest in rivers, streams, and creeks; and they claim that the tolls or compensation should be fixed by the Court, and that they should recover damages for the unnecessary damage to the construction and improvements during the drive of the spring of 1903. The claim for damages does not appear to have been followed up.

It is quite apparent upon this pleading that plaintiffs' claim is in respect of the logs and timber driven by defendants over the improvements during the spring of 1903, and that plaintiffs are asking payment of a reasonable compensation for the use of the improvements during that period, but do not present any fixed rate or toll established by any of the methods referred to in sec. 13 of the Rivers and Streams Act; on the contrary, they ask that the tolls or compensation should be fixed and determined by the Court. And at the trial and during the argument of the appeal, they maintained the same ground and insisted upon their right to obtain from the Court judgment for such sum as the Court might fix and determine as reasonable to be allowed to them. They expressly objected to be bound by the rate fixed in the District Judge's order of 30th March, and asked to be allowed to amend their claim so as to increase the amount of the demand beyond the \$1,000 therein claimed.

Their reason for this attitude evidently was, that they felt that they could not rely upon the order of 30th March as applying to defendants' saw logs and timber driven over the improvements in the spring of 1903. The object of their action was plainly to obtain judgment from the Court, notwithstanding the want of an order fixing rates applicable to the season of 1903.

The real question in this action, therefore, is whether, the tolls not having been otherwise fixed, the plaintiffs are entitled to be allowed by the Court a reasonable sum by

way of tolls in respect of the timber and logs of 1903, and to judgment therefor.

A reference to the terms of the statute makes it clearly apparent that the Court has no such power. It is true that in sec. 11 the right given to all persons to float and transmit saw logs and other timber, etc., through and over constructions and improvements, is subject to the payment to the person who has made the constructions and improvements of reasonable tolls, but that provision must be read in connection with sec. 13, which provides in explicit terms for the mode in which the tolls are to be fixed. If not fixed as otherwise provided by that section, the Judge of the County Court, or the Judge or stipendiary magistrate of the district in which the constructions and improvements are, is the proper tribunal for ascertaining and fixing the tolls. He is given specific directions as to certain matters which he is to have regard to and take into consideration, and an appeal lies from his order or judgment to a Divisional Court, and the provisions of the Act in this regard are made to apply to past as well as to present and future constructions and improvements, so that, as respects the jurisdiction of the Judge or stipendiary magistrate, all periods of time are covered. These provisions confer exclusive jurisdiction to fix the tolls upon the different tribunals mentioned in sec. 13, and render it incumbent upon any person seeking payment for the use of constructions or improvements to produce as a condition precedent to recovery an order or judgment of one of the tribunals fixing the tolls. Such being the effect of the provisions of the Act, plaintiffs' action, as launched and maintained throughout, must fail. If treated as an action based on an order of the District Judge, it must also fail, for they have produced no order covering the logs and timber driven by defendants through and over the improvements during the season of 1903. The first order of January, 1904, was set aside and vacated on appeal to a Divisional Court. The order of 30th March is, as the evidence indicates and as appears upon the face of it, applicable only to saw logs and timber to be floated or transmitted, and, as already pointed out, was not relied upon or put forward by plaintiffs as supporting their claim. It is plainly an order made applicable to the future and should only be given effect to in that sense.

The evidence in this case, as well as the judgment of Street, J. (3 O. W. R. 333), upon the appeal against the order of January, 1904 (which is not wholly printed either in the appeal book or in the report of this case in 10 O. L. R. 193), indicates that it does not necessarily follow that the rate which was fixed by the order of 30th March for the logs and timber to be floated or transmitted in the future would be the rate proper to apply to logs and timber floated or transmitted in prior years; and it is not safe or proper to treat the latter order as one fixing or assuming to fix a rate with regard to saw logs and timber floated or transmitted in the spring or season of 1903. The rate for that year was never effectively fixed by the District Judge.

The result is that there is no rate of tolls fixed in respect of the saw logs and timber floated or transmitted in the spring or season of 1903, in respect of which alone plaintiffs make claim in this action.

On these grounds the judgment of the Divisional Court should be affirmed.

OSLER, J.A., gave reasons in writing for the same conclusion.

GARROW, J.A., concurred, also giving reasons in writing, in the course of which he referred to *Caldwell v. McLaren*, 9 App. Cas. 392; *Mayor of Newport v. Saunders*, 3 B. & Ad. 411; *Corporation of Stamford v. Paulett*, 1 Cr. & J. 58; *Barry R. Co. v. Taff Vale R. Co.*, [1895] 1 Ch. 128; *Great Eastern R. Co. v. Harwich*, 41 L. T. N. S. 533; *Vestry of St. Pancras v. Batterberg*, 2 C. B. N. S. 477, 486; *Groves v. Wimborne*, [1898] 2 Q. B. 402; *President of Bronte Harbour v. White*, 23 C. P. 184.

MEREDITH, J.A., concurred, for reasons stated in writing, wherein he referred to *Corporation of Stamford v. Paulett*, 1 Cr. & J. 58, 400; *Bentley v. Manchester, etc., Co.*, [1891] 3 Ch. 322.

MACLAREN, J.A., also concurred.

JUNE 16TH, 1906.

C.A.

**McOUAT v. UNITED COUNTIES OF STORMONT,
DUNDAS, AND GLENGARRY.**

Municipal Corporations—Drainage—Flooding Lands—Cause of Action—Injunction—Damages—Drainage Referee—Appeal while Reference still Pending—Negligence—Insufficiency of Excavation—Improper Deposit of Material Excavated—Breach of Trust—Allowing Contractor to Escape from Obligation as to Place of Deposit—Engineer—Directions of—Depth and Width of Excavations.

Appeal by defendants from judgment and report of Drainage Referee, dated 28th November, 1904, awarding the plaintiffs, James and Thomas H. McOuat, of the township of Matilda, \$400 damages for injuries which their lands sustained by flooding.

M. Wilson, K.C., and J. Leitch, K.C., for defendants.

E. D. Armour, K.C., and I. Hilliard, Morrisburg, for plaintiffs.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.), was delivered by

MEREDITH, J.A.:—The appeal comes up in a manner which is quite irregular and unsatisfactory, as it appears to me. The action was for flooding lands, and the relief sought an injunction and damages; and the whole matter was referred to the Drainage Referee. After a prolonged reference, that officer has expressed the opinion that plaintiffs are entitled to recover \$400 damages, but that it would be unsafe to grant an injunction without further evidence, and therefore that the reference should be postponed until plaintiffs can furnish such evidence. So that there is nothing like finality of the reference, nothing, that I can perceive, to prevent a recasting of the Referee's opinion in a very different mould, in all respects, before he becomes functus officio—before he has parted with the case. The nature of the injunction to be granted might afford a test of the Referee's opinion regarding plaintiffs' right to recover; it might prove,

even to himself, that the view he has formed is erroneous. The work was done at so much per yard, not at a price for the whole work, and all the money available was so expended. And other matters of much difficulty presented themselves. And if all that were not so, the appeal would be against a partial finding only, with the probability of another protracted reference and another costly and long drawn out appeal. That ought not to be encouraged in any case, and much the less so in one in which the reference, as far as it has gone, which might well have been heard in as many days, has already extended over more than 3 years; and this appeal over as many days as hours should have sufficed. But the appeal has been taken, in a book of nearly 800 pages, and been argued at great, if not wearisome, length, without objection on this score from any one; so that it may be well to dispose of it on its merits, and await the next instalment, but not to pass over the mode of bringing it up as if it were quite unobjectionable to any one.

Plaintiffs' claim, as presented in the pleadings and throughout the reference, was based upon two grounds of negligence: (1) the insufficiency of the excavation; and (2) the improper deposit of the material excavated. Other grounds, affecting the validity of the first by-law, were also taken upon this appeal, but need not be referred to further than to say that they were wholly inconsistent with plaintiffs' course throughout, within this litigation as well as without, and inconsistent with their interests, as well as taken, now for the first time, more than 20 years after the statute—46 Vict. ch. 18, sec. 573 (O.)—had rendered them ineffectual, and after the dismissal of an action brought to quash the by-law.

Plaintiffs have nowhere stated the legal grounds upon which their claims are based—the legal character of the causes of action upon which they seek relief; and their counsel, upon this appeal, were unable or unwilling to state them. Giving their allegations of fact the fullest meaning, they may cover two causes of action: (1) the ordinary action of trespass upon the case for flooding their lands; and (2) breach of trust. No statute giving any right of action was relied on or referred to. . . . Township of Raleigh v. Williams, [1893] A. C. 540, affords no authority for it. That was an action based upon the duty, expressly imposed by statute, of keeping drains such as that there in

question in repair; and if it could rightly be said that it logically follows from that judgment that plaintiffs have a cause of action if they failed, through defendants' fault, to obtain all the benefit they would have had from the work in question if it had been properly done, that is, that defendants should make good the difference between the benefit plaintiffs have had and that which they ought to have had from the work, assuming that there was such a difference—the answer might well be that a judgment is an authority for that which is decided by it, and not for all that might logically follow from the reasoning in it.

Plaintiffs failed, in my judgment, to prove anything like a good cause of action at law for flooding their lands. It would be an extraordinary thing if the great expenditure of money which was incurred, the great amount of work which was done, under the direction of the most experienced and best engineers available, and the superintendence and care of a competent committee of defendants' council, and under the interested and vigilant eyes of plaintiffs and others; the removal of the dam, shoals, and other obstructions, substantially all lower down stream than plaintiffs' lands, work done for the one purpose of preventing as much as possible the flooding of such lands, should have had the effect of flooding them more than ever; and also an extraordinary thing that, though the work was begun in the year 1885, plaintiffs' claim is for injury sustained in the years 1899 and 1900 only. It would be a different thing if plaintiffs' lands were as near to the foot as they are to the head of the work. As one might well expect, the cause of plaintiffs' loss appears to have arisen, not from any greater obstruction to the channel the better opening of which was the sole purpose of the great work and great expenditure, but excessive rainfalls in 1899 and 1900 brought into the channel from a more extended watershed with increased rapidity through improved drainage and cultivation in that and from year to year—the ordinary process of evolution in such matters in this new country. Looking at the maps shewing the great area of the watershed, and the network of drains in it, and reading the evidence of the sluggish character of the stream called the Nation river, in which the work was done, and which is the only outlet for all of the waters of that area, there is nothing extraordinary in plaintiffs sustaining injury upon their low-lying lands in years of excessive rain-

fall and moisture and consequent excessive and long continued summer floods. They have, as I find, wholly failed to prove that their outlet was in any manner obstructed by anything done by defendants negligently or otherwise; though the relief which they expected to obtain by means of the work has not been obtained, the benefit of it may fall very short of their expectations; and it has been proved that the injury which they did sustain arose from other causes—those which I have mentioned. This ground of action therefore fails; and I have been unable to find anything in the Referee's reasons shewing that he had come to any contrary conclusion, that is, that he had found that the work left plaintiffs' lands worse than they were before it was undertaken.

Then are defendants liable for any breach of trust? It is said that they plainly are, for having relieved the contractors on the work from an obligation to put the excavated material upon the high and more distant banks of the stream, and permitting them to place it under such banks, thereby greatly reducing the efficacy of the work. At first sight this charge seems like a formidable indictment; but one naturally asks why, if it really were half as objectionable a course as plaintiffs assert, was it done? No one impugns the good faith or skill of the engineer nor the integrity and ability of the committee of council. Upon closer investigation, reasons which seem to be abundantly sufficient for, if they did not indeed substantially necessitate, the change, appear. The by-law contained nothing directly or impliedly bearing upon the subject; the provisions as to the removal of the excavated material are contained in the agreement with the contractor for the doing of the work—entered into several months after the passing of the by-law; and that provision by no means required the material to be removed beyond the high banks as clearly as plaintiffs contend for. It is in these words: "The material to be excavated will be measured in position, and when excavated will be placed on the bank at a distance of not less than 3 feet clear from the river, unless directed by the engineer to be placed at a less distance." The words "on the bank" are somewhat indefinite—whether near or distant, or whether high or low water, banks, is not expressly intimated. In many streams in this province the high and distant banks are in places a half a mile away or more from the river, even at high

water; but that does not seem to have been the case with the stream in question at the place where the work in question was done. Then there is the extraordinary provision contained in the words "unless directed by the engineer to be placed at a less distance;" that is—whether the words "the river" meant the water or meant the top of the high banks, near to which the water could never come—the engineer might direct a change in the place of deposit to the extent of 3 feet—one yard of earth—which could never have been meant, but is an obvious mistake, however it may have arisen. So that there was, upon the wording of the contract, abundant material for dispute and litigation upon a question whether the contractors were really bound to remove the material beyond the high banks; a thing which they could never have done at the price contracted for—29 $\frac{3}{4}$ cents a cubic yard for material other than rock, and \$1 for the latter. There was also a provision in the contract that the decision of the engineer in charge as to the location and deposit of the material excavated and removed, should be final, subject to a provision as to arbitration contained in the agreement, and also another provision that in case of any doubt as to the meaning of the specifications the decision of the engineer in charge should be final. When the matter came to a practical test, it was found to be virtually impossible to deposit the excavated material upon the high banks, for that was private property, over which none of the parties to the contract had any power; the right to use such lands as dumping grounds would have to be acquired, if it could, and there were no means for that purpose. In these circumstances, the engineer in charge decided, as under the contract he might, that the material might be deposited in the deep places of the river so that in every case it should be at least one foot below the bottom grade of the cut. It is very difficult to find any negligence or breach of trust in this. What better could have been done? If the view that the terms of the contract required removal beyond the high bank were insisted upon, litigation with the contractor might have followed; and had the engineer decided in favour of that view, and had the contractor acquiesced in it and attempted to act upon it, litigation, in which both parties to the contract must have failed, would have been certain, at the suits of the land owners concerned, whose lands were invaded, and injunctions would have prevented the work.

So that, even if the course which the engineer adopted would necessarily have rendered the work less effectual, it could not, practically speaking, have been avoided. But it is not proved that it was likely to have or had any such effect. Why should it? Plaintiffs objected promptly to the course the engineer took; they complained to the Commissioner of Public Works for Ontario, a large provincial grant in aid of the work having been made; and the complaint was promptly investigated by the engineer of the department—a competent and impartial public officer—under the direction of the Commissioner, and was found to be unsubstantial, the engineer having reported that the course adopted was not objectionable, and that the drainage committee and engineer were endeavouring to have the work carried out to the best advantage under the circumstances. This took place in 1886, and nothing more seems to have been made of the complaint until this action was brought 15 years afterwards.

I find that the work was in no manner substantially deprived of any of its effect by the direction of the engineer in charge as to the removal and deposit of the excavated material; that that direction was a proper one under all the circumstances; that the engineer had the power to make it without the consent of either party; and that, in any case, it was no breach of trust on the part of defendants, who in good faith and with much care appointed the best available engineer, and would have been justified in acting upon his advice if a change had been made by them, not by him; that, since defendants' work ceased, plaintiffs took part in doing work of the character of which they complain, that is, dumping material excavated from the bed of the stream within the high banks; . . . it is evidence in favour of the action of the drainage engineer, of the report of the departmental engineer, and of my finding.

There is even less evidence to support the last ground of the action—that the excavations were not made to the depth and width provided for. . . .

It may be to be regretted that better drainage has not been obtained—that the scheme adopted and carried out did not prove as effectual as it was hoped it would—but the owners of low-lying lands must not expect more than they are lawfully entitled to; they must not expect the advantage of low lands, which may be acquired originally at low prices,

in receiving and being enriched by alluvial soil brought down from the higher lands and deposited upon them by floods, with all the advantages of the uplands from which the enriched soil has been by nature robbed. If swamp lands are to be thoroughly drained at some one else's expense, they would not be purchasable for a song, but would be of greater value than high and dry lands. It is easy for a purchaser of low-lying lands to complain, and one's sympathies naturally go to him when his crops are destroyed by flood, but he has no right of action except for a wrong done to him by the party sued.

The result, upon my findings, is that plaintiffs' action fails upon all grounds, assuming that they have at law or under any statute a right of action; the more so if and in so far as the right of action may be of an equitable nature for breach of trust; they have not sustained in evidence the facts upon which their claims are based. It is not necessary to consider whether in any respect plaintiffs have no right of action in the absence of the other persons having equal rights with them in the drainage proceedings in question.

Appeal allowed and action dismissed with costs.

JUNE 16TH, 1906.

C.A.

RE PORT ARTHUR AND RAINY RIVER PROVINCIAL ELECTION.

PRESTON v. KENNEDY.

Parliamentary Elections—Corrupt Practices—Proof of Agency—Appointment as Scrutineer—Burden of Proof—Common Law of Parliament—Corrupt Acts and Irregularities apart from Agency—Scrutiny of Votes—Disqualification of Voter—Crown Lands Agent—Person Voting in Wrong Subdivision—Agent or Scrutineer at Polls—Persons Voting on Transfer Certificates—Names not on Voters' Lists—Proof of Voters' Lists—Persons Voting in Wrong Subdivision without Transfer Certificates—Persons Voting on Certificates Signed in Blank—Constables—Certificates by Telegraph—Tendered Vote—Costs.

Appeal by W. A. Preston, the petitioner, from the judgment of MACLENNAN, J.A., and TEETZEL, J., the rota

Judges, dismissing the petition, after trial at Port Arthur. There were 140 charges of corrupt practices contained in the particulars, and scrutiny particulars were also delivered, and supplemental particulars. There was also a cross-petition, which was dismissed. The declared majority at the election of H. W. Kennedy, the respondent, was 14, but this was reduced to 11 by counting tendered ballots.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

I. F. Hellmuth, K.C., F. H. Keefer, Port Arthur, and W. J. Elliott, for the appellant, contended that the trial Judge having found that one William Aikens was guilty of corrupt practices, should have found that Aikens was an agent of respondent, and have declared the election of the respondent void; that upon the evidence it was shewn that corrupt practices extensively prevailed; that upon the scrutiny of votes the trial Judges erred in refusing to strike off the vote of one W. H. Hesson as a person disqualified from voting, and the votes of other persons; that it was competent for the appellant to give evidence of any corrupt acts charged in the particulars, even though the persons charged were not agents of respondent; that the trial Judges erred in holding that the election would not be avoided at common law if acts of corruption were proved which might be supposed to have affected the result of the election; and that the trial Judges erred in holding that certain irregularities and illegalities did not shew that the result of the election was affected.

A. B. Aylesworth, K.C., and W. McBrady, Port Arthur, for H. W. Kennedy, the respondent, contra.

Moss, C.J.O.:—The first question on this appeal is whether the election is to be avoided by reason of the corrupt acts committed by one William Aikens. That depends on whether agency has been proved. I am of opinion that it has not been established.

The corrupt acts of which Aikens was found guilty by the trial Judges were committed at Hymers, a polling place in the electoral division, on the polling day. Before that day his sole connection with the respondent was that on one occasion, several days before the nomination, he, being the owner of a livery at Port Arthur, had driven the respondent

to and from a place called Silver Mountain. During the trip the respondent canvassed him for his vote, that is, he said he would like him to support him. Aikens said he would see. He made no promise, and nothing more passed between them. The respondent made no request to him to work for him; he simply asked him for his support, and he saw and heard no more of or from him during the election.

On the day before the election Aikens and one Joseph Greer drove from Port Arthur to Hymers, arriving there in the evening. The trip was undertaken at the instance of Greer, who was not shewn to be an agent of the respondent. Greer requested Aikens to accompany him to Hymers, and in order to persuade him to do so told him he would procure a transfer of his vote to Hymers, so that he would not lose his vote by being absent from Port Arthur on polling day. And he afterwards brought and handed to Aikens a printed paper, signed by the respondent, apparently one of a number of scrutineer appointments which the respondent had signed in blank and left with his agent Mr. D. F. Burke. Aikens's name was not inserted by the respondent, and there is no evidence to shew by whom it was filled in. The number of the polling place was left blank, and never was filled in.

There is no proof of the means by which Greer became possessed of this paper. Aikens's testimony as to Greer's statements to him was received in anticipation, apparently, of proof of agency or of other testimony to shew the circumstances under which he obtained the paper, but Greer was not examined, and nothing further was shewn of the circumstances.

There was an entire failure to connect the respondent, through himself or his agents, with the giving of the paper to Aikens. What was proved falls far short of what is required in order to establish agency as against the respondent or to shift the burden of proof. The mere fact of Aikens having driven the respondent and receiving pay therefor 10 or 12 days before polling day is, of course, no proof whatever of agency on polling day. Neither is the request for his support made at the same time, nor are the two together, nor do they naturally support an inference that because of them Aikens would be found acting as an agent on the polling day at Hymers or elsewhere in the election. And, if the petitioner intended to rely upon the possession of the paper, it lay upon him to trace it and shew that it came to Aikens

through, or with the knowledge of, the respondent or his agents. And if, in order to accomplish this, it was necessary to examine Greer, it was for the petitioner, and not the respondent, to call him as a witness. But, even if it had been shewn that Aikens's appointment had come from the respondent, it does not follow that it rendered the respondent responsible for every act of which Aikens might be guilty. The agency was of a limited nature. The duties the performance of which were authorized were confined to the polling booth, and it may well be that for acts done outside of and totally disconnected with the performance of the authorized duties the respondent should not be subjected to the same consequences as in the case of corrupt acts by a general agent.

In the circumstances of this case, however, it is sufficient to say that there has been a failure to establish that Aikens was an agent for whose acts the respondent was responsible, and that the finding of the trial Judges to that effect should not be disturbed.

The common law of Parliament has also been invoked, and it is urged that enough appears in corrupt acts practised by Aikens and Greer and in irregular proceedings at and attending the election to avoid it as one not embodying the expression of the free will of the electors. Aikens and Greer's operations were confined to a very small portion of the constituency. And it was stated by counsel for the petitioner they were only prepared to shew 4 or 5 other cases in which these individuals were concerned.

The trial Judges found only one person (Aikens) guilty of corrupt practices, and they also found and reported that there was no reason to suppose that corrupt practices extensively prevailed at the election. There is nothing to connect the respondent with the alleged corrupt acts. There is the absence of proof of agency. If, in circumstances such as these, an election is to be avoided, it should only be on overwhelming proof of corrupt acts of so extensive a nature as virtually to amount to a repression or prevention of a fair and free opportunity to the electors of exercising their franchise and electing the candidate they wished to represent them.

As to the irregularities the respondent is entitled to the benefit of sec. 214 of R. S. O. 1897 ch. 9.

As regards the scrutiny and the questions which were argued with respect to it:—

1. Hesson's vote. No. 5 of the scrutiny charges.

The question is whether he was an agent for the sale of Crown lands, and so disqualified from voting under sec. 4 of the Ontario Election Act, R. S. O. 1897 ch. 9. It appears that he was an agent under the Free Grants and Homesteads Act, but his authority was restricted to taking entries and making locations for free homesteads under the Act, and that he was not authorized to sell or to receive moneys for the sale of public lands. It would be an extension of the terms of sec. 4 to say that he was an agent for the sale of Crown lands. He had no commission or authority to act as agent for sale, and he did not assume to act in that capacity. His vote was therefore properly held to be good.

2. McKay's vote. No. 49 of the scrutiny charges.

This person voted at Beaudreau's, which was not his proper polling subdivision. He was requested by the deputy returning officer at the former place to drive some voters to the poll at Beaudreau's. He objected that by doing so he would lose his vote, and the deputy returning officer thereupon furnished him with a transfer or certificate to vote at Beaudreau's. He had not been named as the agent of the respondent at Beaudreau's, nor did he receive any such appointment other than the request of the deputy returning officer. He did not in fact, act as agent at Beaudreau's, though he appears to have taken the oath of secrecy, and his only reason for going there was to drive the voters to the poll, in compliance with the deputy returning officer's request. He was, therefore, not a person entitled to request or to be given a certificate under sec. 94 (1) and (4) of the Act. He was not an elector who had been named the agent of the respondent at a polling place other than the one where he was entitled to vote. If he was an agent at all, he was agent for an entirely different purpose, and it was the only one which he himself believed he was appointed for. His vote should not have been allowed. From the short note of the judgment in his case it would seem that the vote was allowed on another ground, viz., that his name being on the original general voters' list, and his vote having been tendered and accepted at Beaudreau's, it should not be struck off, although his name was not on the list at that polling subdivision.

This point will be dealt with later on, when the cases of that description are reached.

3. A class of persons voting on transfer certificates whose names were not on the voters' list in the poll books of the polling subdivisions from which they were stated to have been transferred.

The trial Judges ruled that in order to render these votes void it was incumbent on the petitioner to produce the original general voters' list and shew that the names of the voters were not on it. The petitioner contends that it was sufficient to produce the list in the poll book of the subdivision from which the voter was transferred, and that if it appeared that the voter's name was not on it his vote must be disallowed. The question depends on the meaning to be given to the words "voters' list" as they appear in sec. 94 of the Election Act. To what list is the returning officer to refer before giving a certificate entitling an elector to vote at a polling place other than the one where he is entitled to vote? The purpose of the reference is of course to ascertain whether the applicant for the certificate appears to be entitled to vote at the subdivision from which he seeks to be transferred. The returning officer is not required to give the certificate unless requested to do so at least two days before the polling day: 4 Edw. VII. ch. 3, sec. 2. This enactment seems to contemplate that by that time all the subdivision poll books will have passed from his possession. And these seem to be the only voters' lists that are at any time in his possession. The voters' list certified by the County Judge from which the lists in the subdivision poll books are made up is never in his possession.

Section 21 (3) of the Voters' Lists Act, R. S. O. ch. 7, enacts that the Judge shall retain one of the certified copies, and shall deliver or transmit by post registered one of the certified copies to the clerk of the peace of the county or union of counties within which the municipality lies, and one of the certified copies to the clerk of the municipality, to be kept by him among the records of his office. Section 77 of the Election Act provides that, subject to certain provisions of the Act which do not affect the present question, the first and third parts of the last list of voters certified by the Judge and delivered or transmitted to the clerk of the peace under the Ontario Voters' Lists Act, before the date of the writ of election, shall be the proper list to be used for the

purposes of an election. Section 78 enacts that, subject to sec. 108, no person shall be admitted to vote unless his name appears on the list in the poll book.

Then by sec. 84 of the Election Act it is enacted that every returning officer upon granting a poll at an election shall forthwith deliver to the clerk of the peace as many blank poll books as there are polling subdivisions in the electoral district, and the said clerk of the peace shall without delay enter or cause to be entered in the poll book for each subdivision from the proper list of voters the name of every person appearing therefrom to be entitled to vote within the subdivision for which the poll book is required, and certify it as a true copy of the proper list of voters for the polling subdivision, and the poll books so completed shall be re-delivered to the returning officer, who shall immediately cause them to be delivered to the deputy returning officers appointed to hold the polls throughout the electoral district. And by sub-sec. (2) the clerk of the municipality, who has the custody of a voters' list, shall, if required by the returning officer, discharge the duties assigned to the clerk of the peace.

Thus it appears that the only custodians of copies of the voters' lists certified by the Judge are the Judge, the clerk of the peace, and the clerk of the municipality. The only lists, therefore, to which the returning officer could refer for the purpose of giving a certificate under sec. 94 were the lists in the poll books for the subdivisions delivered to him by the clerk of the peace or the clerk of the municipality. It follows that in the cases under consideration the production of the poll book of the subdivision was all that was necessary for the petitioner's purpose. The contrary ruling of the trial Judge should therefore be reversed.

4. Cases of persons voting at a polling place other than that in which they were entitled to vote without a transfer certificate enabling them to vote at the polling place at which they did vote.

These votes are in direct violation of sec. 78 of the Election Act. Except in the case of a tendered vote under sec. 108 or a vote polled upon a transfer certificate under sec. 94, no person is entitled to be admitted to vote unless his name appears on the list in the poll book. The votes were therefore improperly received. The only question there can be is whether the vote having been received, it ought to be allowed to stand where it is shewn that the voter was entitled to vote

elsewhere. But such a practice would tend to many irregularities and perhaps frauds. And it is better that in the few instances where such a thing does occur the vote should be lost than that so serious an innovation of the statute should be permitted. The rulings in the Lincoln Case (2) with regard to James B. Gray's vote and William T. Gibson's vote, H. E. C. 514, 515, do not carry the law to the point argued for. In each of these cases it would appear that the voter's name was on the list at the place where he voted, and the objection was that, notwithstanding the presence of the name on the list, the vote was bad for want of qualification. The judgment in the Prescott case, H. E. C. 780, appears to be based on similar grounds.

At the time when these decisions were rendered and until 1892, the provision of the statute was not so clearly expressed as at present. The Ontario Election Act, 1892, for the first time enacted in sec. 72, what is now sec. 78 of the present Election Act. Previous to this the expression used was "on the last list of voters" (see 32 Vict. ch. 21, sec. 10, and 39 Vict. ch. 11, sec. 9); or "on such list" (see R. S. O. 1877 ch. 10, sec. 73); or "on the list" (see R. S. O. 1887 ch. 9, sec. 72). These left open the argument that if the name appeared on the list or any of the lists prepared by the clerk of the municipality and delivered to the clerk of the peace, the vote once polled was good. The ruling in the case of William Little's vote in the Brockville case, H. E. C. 130, may have proceeded on this view. The words of sec. 78 of the present Act, "on the list in the poll book," seem to end all uncertainty.

5. Persons voting on certificates signed in blank by the returning officer and whose names were afterwards filled in by the election clerk or other persons.

These certificates are clearly against the provisions of sec. 94, which prohibit a returning officer from giving a certificate until he has ascertained by reference to the voters' list that the applicant is entitled to vote (sub-sec. 1) and from signing such a certificate until the name, residence, and occupation of the person to whom it is to be granted have been inserted therein (sub-sec. 4). A personal duty is cast on the returning officer which he must perform for himself as long as he continues to hold the position. And there is nothing in the Act to warrant him in giving his signature in blank to be afterwards filled in by others with

the names of persons in regard to whom he has not obeyed the injunction of the statute. The holder of such a certificate is thus placed in a position to poll a vote at a polling place where his name does not appear on the list in the poll book, although he is not in truth the holder of (to employ the language of sec. 92) "a certificate properly granted under sec. 94."

The only question then is, whether the elector should be deprived of his vote by reason of the returning officer's neglect of duty. But, as the elector is seeking a special privilege, it is no hardship to impose on him or the person making the request on his behalf the duty of seeing that the statutory requirements are duly complied with. And there appears to be no good reason why the considerations applicable to the preceding cases should not also apply to these.

6 and 7. It is apparent from what has been said that certificates given to constables and certificates sent by telegraph are not properly granted under sec. 94, and cannot support votes received by virtue of them.

The argument of convenience having regard to the area and extent of the constituency is no doubt weighty, especially as regards certificates filled in by the election clerk, but there are the positive prohibitory terms of the section, which close the door against the signature to the certificate until the name, residence, and occupation of the elector have been inserted therein.

8. White's case. Upon the evidence this elector did not tender his vote to the deputy returning officer at the proper polling place (Bouin). His name was not on the list of the poll book in the custody of either Woodside (in the evidence called Whiteside) or Bouin, and he did not demand from the latter or receive a tendered ballot in the manner required by sec. 108. His vote could not in any event be counted on the scrutiny. And even if there had been a proper demand and an improper refusal there was nothing more than an irregularity.

The result on the whole is that the election is not avoided, but, as some of the rulings on the scrutiny proceedings were erroneous, the case must go back to be continued on that branch, pursuant to the arrangement made at the trial.

As to costs. The petitioner failed on the charges of corrupt practices, and he should pay to the respondent the costs of

and occasioned by that branch of the case. The costs of the scrutiny should be reserved to be dealt with by the trial Judges or Judge by whom the scrutiny is continued and concluded.

And as on the appeal success is divided, there should be no costs of it to either party.

OSLER and GARROW, JJ.A., for reasons stated by each of them in writing, agreed with the conclusions reached by the Chief Justice.

MACLAREN, J.A., also concurred.

MEREDITH, C.J., agreed as to the scrutiny, but dissented as to the corrupt practices and proof of agency, and was of opinion that the election should be avoided.

JUNE 16TH, 1906.

C.A.

VALIQUETTE v. FRASER.

Negligence—Injury to Person—Falling of Wall of Building—Exceptional Storm—Defective Construction—Employment of Competent Superintendent and Builder—Cause of Injury.

Appeal by plaintiff from order of a Divisional Court (4 O. W. R. 543, 9 O. L. R. 57), affirming judgment of TEETZEL, J. (4 O. W. R. 60), dismissing the action, which was brought by the widow and administratrix of one J. S. Valiquette to recover damages in respect of the death of her husband, a boiler-maker, who, while working for a contractor at a boiler-house in course of erection for defendants Fraser & Co., was killed by the falling of a wall of the building. After the walls and roof had been completed, machinery was brought into the building through large door openings left unclosed for that purpose. The wind during a violent storm, rushing in through the openings, forced off the roof, and the walls fell. The Court below held that leaving the openings was no negligent act, and also that there was no liability by

reason of the mode of construction, even if it was defective, the owner being entitled to rely on the skill of competent architects and builders.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

J. Lorn McDougall, Ottawa, for plaintiff.

C. A. Moss, for defendants.

MEREDITH, J.A.:—To entitle plaintiff to judgment in this action, it was necessary for her to prove that defendants were guilty of actionable negligence towards the man who was killed—the breach of some duty which they owed to him—and that such negligence was the real cause of his death. It is enough to say that both of these things have not, if either of them has, been proved. . . . The wall fell in a squall of a very unusual and extraordinary character—of very unusual, concentrated, energy. The building was in an unfinished state, still under construction; among other things, the openings for windows and doors were not yet filled in, giving much greater scope to the destructive power of the storm.

After the best consideration I have been able to give to the case, I am unable to find that actionable negligence has been proved—that the onus of proof in this respect has been satisfied; and, if it had, I would be unable to find that any such negligence, and not the effect of an extraordinary wind storm upon a new building in an unfinished state, was the proximate cause of the injury.

After the findings of the trial Judge and of the Divisional Court against plaintiff on these pure questions of fact, one should need to be very clearly of a contrary opinion before giving effect to this appeal; to the contrary of that, I would have reached the conclusions which I have expressed upon these questions if there had been no prior findings upon such questions.

Appeal dismissed, and with costs if demanded.

OSLER, J.A., gave reasons in writing for the same conclusion.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., also concurred.

JUNE 16TH, 1906.

C.A.

GLOSTER v. TORONTO ELECTRIC LIGHT CO.

Negligence—Injury to Infant—Electric Wire—Proximity to Highway—Nuisance—Jury.

Appeal by defendants the electric light company from judgment of TETZEL, J., in favour of plaintiffs, upon the findings of a jury, in an action by a boy of eight and his father against the electric light company and the corporation of the township of York, to recover damages for injuries sustained by the boy and consequent expense occasioned to his father by the alleged negligence of defendants in leaving a live wire so exposed that the boy touched it. This was in crossing the Glen road bridge from the city of Toronto into the township of York, on 8th October, 1904. The jury exonerated the township corporation, but found the electric light company guilty of negligence, and assessed the boy's damages at \$1,700 and the father's at \$800.

W. R. Riddell, K.C., and R. H. Greer, for defendants.

W. N. Ferguson, for plaintiffs.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, J.J.A.), was delivered by

OSLER, J.A.:— . . . Several years before the occurrence which gave rise to the action, a private corporation known as the Scottish Ontario Land Co. were the owners of a large plot of ground in the township of York near the city of Toronto, part of which they had laid out into building lots, laying out streets thereon which connected with existing highways in the township. They had also, in order to provide for access to and from the city, built a substantial bridge 24 feet in width over a wide and deep ravine on their property. Neither the street (Glen road) as laid down on the plan through the ravine, nor the bridge over it, had been assumed by the defendant township corporation as a public highway, though the latter, as the settlement in the township grew up, came into constant and extensive use. After the bridge was built, and some 9 or 10 years before action, the defendants the electric light company carried their

wires west of the bridge across the ravine on poles along the sides and bottom of the ravine, the wire as it came up the incline at the north end of the bridge being between 6 and 7 feet from the west side of the bridge, according to the recollection of such witnesses as could speak to its position at that time. The right of the defendants to erect these poles and carry their wires across the ravine in this manner was not in dispute, and the wires or some of them were connected with poles for arc lights a short distance beyond the north and south ends of the bridge.

In course of time the bridge became out of repair and dangerous, and, while it had become of great importance to a large section of the public in the city and township, the company who had built it had ceased to have much, if any, interest in its maintenance, and had put up a notice that persons using it did so at their own risk, and the township corporation disclaimed any obligation to repair it.

The legislature finally intervened, and by 3 Edw. VII. ch. 89, after reciting that the bridge had become to all intents a public highway, enacted that the township, without passing any by-law for the purpose, should reconstruct and repair it as a local improvement, assessing the cost upon the property benefited as described in the Act. The works were to be performed under the supervision of a competent engineer to be appointed by the County Judge, but their construction was not to impose upon the township any liability for their future maintenance and repair.

The new bridge thus built by the township under the authority of the Act was being practically used for traffic of all kinds by the end of the first week in August, 1904, though some work remained to be done upon it, and it was not finally approved by the engineer in charge until the middle of September, subject to some painting being done upon it, which seems not to have been completed before 1st October.

The bridge was an iron structure, 4 feet wider on each side than the old one, or in all a trifle more than 32 feet wide. On each side it was protected by a lattice-work iron railing 4 feet 1 inch in height above the sidewalk of the floor of the bridge, with lozenge-shaped openings therein, 16½ inches in width. The distance between the railing and defendant company's wire, as reduced by the widening of the bridge, was variously stated as from 14 to 20 inches, the wire being, at

the place where the boy touched it, a little lower than half way between the top of the railing and the floor of the bridge.

On 8th October, 1904, plaintiff Francis Gloster, a boy of between 8 and 9 years of age, who was crossing the bridge or playing thereon with some companions, pushed his arm through one of the lower openings in the lattice work of the railing, and touched or took hold of the wire. There was some reason to suppose from his examination before the trial that he was attempting to reach it with a small metal toy he had in his hand, but this he would not admit or did not remember when giving his evidence at the trial. The insulation of the wire being imperfect, the result was that the boy's hand, where it had taken hold of the wire, and his head, which rested upon or touched part of the iron work of the railing, were very severely burnt.

It was quite clear from the whole of the evidence that the wire could not be touched accidentally by any one merely passing over or standing on the bridge or at the railing, or who was looking through or over the railing, or without intending to touch it or without deliberately reaching out through the railing as far as the wire, and there was no evidence that there was anything of a character likely to entice or induce children to play with or put their hands upon it, and the Judge, without objection, so told the jury.

There was evidence that a servant of defendants, in the ordinary course of his duty, crossed the bridge for the purpose of trimming the electric lamps, and it was said that he must have seen that it was being widened and the distance between the bridge and the wire reduced, and it was also shewn that on one occasion, while the work was going on, the superintendent of construction visited the bridge and stood on the bank of the ravine, though he did not cross over, and the railings of the bridge were not then up. He knew that the bridge was being repaired, but not that it was being widened. At the south end the wires appear to have been much more distant from the bridge than at the north.

The findings of the jury which affected the defendant company were, that the proximity of their wires to the west side of the bridge was a source of danger to the travelling public, and that the negligence of which they were guilty consisted in the wires being too close to the bridge, and for an unreasonable length of time.

I am of opinion that in this case the defendant company are entitled to judgment. The question is whether there was evidence upon which the jury could reasonably have found that the electric wire was a nuisance to those lawfully using the highway. This, I think, must be answered in the negative, and it therefore becomes unnecessary to consider the further question, whether, if the wire could be held to be a nuisance, there was evidence that the defendant company had notice of the altered conditions which made it such.

The highway near which the wire was erected was the bridge. It extended to the width of the bridge, and no further. Everything outside of or beyond that was the property of other persons, upon or over which the public had no right to be, and upon that property the defendant company's wires were lawfully erected.

The duty of the defendant company, as established by *Barnes v. Ward*, 9 C. B. 392, and kindred authorities, was so to use the property of which they were in occupation that it should not be dangerous to persons using the highway with ordinary care.

A breach of that duty is a public nuisance, and gives rise to an action at the suit of any one who suffers a particular injury. . . .

[Reference to *Barnes v. Ward*, 9 C. B. 392; *Hardcastle v. South Yorks R. W. Co.*, 4 H. & N. 67, 74; *Hounsell v. Smyth*, 7 C. B. N. S. 731.]

If in the present case the defendant company's wire had been strung so close to the bridge that any one lawfully using the bridge by travelling along it, or leaning against or looking over the railing, might accidentally or inadvertently touch it, there would be evidence on which a jury might well find such a wire to be a public nuisance. But where, as here, it is distant at least 14 inches from the bridge, separated from it by a railing, and cannot be reached or touched by any one without intending to do so, or without stretching up through the railing beyond the side of the bridge, and therefore outside the highway, as far as the wire, I fail to see how the latter can be said to be a source of danger to any one lawfully using the highway. The use of the bridge by the public as a highway, or for any lawful purpose incidental to such use, was not impeded by the existence of the wire in its then situation, and no deviation was possible by night or by day, in the ordinary course of

such user, which could have resulted in the wire being touched by any one. . . .

[Harrold v. Watney, [1898] 2 Q. B. 320, distinguished. Reference also to Lynch v. Nurdin, 1 Q. B. 29; Binks v. South Yorkshire R. W. Co., 3 B. & S. 244; Macdowall v. Great Western R. W. Co., [1903] 2 K. B. 331; Smith v. Hayes, 29 O. R. 283; Newell v. Canadian Pacific R. W. Co., 7 O. W. R. 771; Hughes v. Macfie, 2 H. & C. 744.]

There being, then, no evidence that the defendant company ought reasonably to have anticipated that any one—children or others—using the highway, would have interfered with their wire, and no evidence of the neglect of any duty on their part to the public, it appears to me that the action fails and that the appeal must be allowed.

JUNE 16TH, 1906.

C. A.

GREIG v. MACDONALD.

Partnership — Dissolution — Claims against Withdrawing Partner—Moneys of Firm Used for Private Purposes—Sale of Interest without Deduction—Construction of Agreement—Reformation—Fraud.

Appeal by defendant from the order of a Divisional Court (6 O. W. R. 342) reversing the judgment of BRITTON, J. (5 O. W. R. 80), so far as it was in favour of defendant, and awarding judgment in favour of plaintiffs for \$321.51.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

George Kerr and Joseph Montgomery, for defendant.

W. E. Middleton, for plaintiffs.

Moss, C.J.O.:—The cause of action alleged was an indebtedness by defendant to plaintiffs individually and as members of a partnership carrying on business under the firm name of Greig & Stewart. The partnership between plaintiffs was entered into on 12th February, 1902. Prior

to that date plaintiff Greig and defendant were co-partners carrying on the business which was subsequently carried on by plaintiffs Greig and Stewart.

It appears from the statement of claim that all the items of alleged indebtedness in respect of which judgment has been given in favour of plaintiffs were items incurred before 12th February, 1902, and could not in any sense be said to be liabilities incurred to the present partnership. Plaintiffs therefore do not shew on the face of their statement of claim that there is a cause of action by them as partners against defendant in respect of these items. It seems equally plain upon the evidence that plaintiff Greig could not maintain the claim individually, for, when these items of alleged indebtedness were incurred, plaintiff Greig and defendant were in partnership, and the moneys which were paid out, and in respect of which defendant was chargeable in the partnership accounts, would properly form part of the accounting between plaintiff Greig and defendant upon the adjustment of the partnership accounts between them. But on 12th February, 1902, and as preliminary to plaintiffs Greig and Stewart forming their co-partnership, defendant sold his interest in the partnership business and the assets to plaintiff Stewart. Thereupon plaintiff Greig and defendant dissolved partnership. The effect in law, therefore, was that the rights of plaintiff Greig and defendant respectively were to have the partnership accounts taken and the business wound up and adjusted.

But defendant having sold and transferred his interest to plaintiff Stewart, the latter was in law entitled to the same right as against plaintiff Greig. Instead, however, of plaintiffs exercising their rights in that regard, they agreed to form and did form their present co-partnership. The instrument of agreement under which defendant transferred his interest to plaintiff Stewart is dated 12th February, and shews upon its face that up to that date plaintiff Greig and defendant were partners, and that they had agreed upon a dissolution. It also shews that defendant had agreed to sell to plaintiff Stewart his interest in the business for . . . \$4,500 cash; and it also goes on to say that the present plaintiffs agreed to continue the business as partners and to assume the payment of all the debts and liabilities of the former firm and to indemnify defendant against the debts and liabilities. It is, in fine, an agreement taking effect, as

of its date, upon the business, both as regards transfer of defendant's interest and as regards formation of the new partnership.

By a separate agreement plaintiffs agreed as to the terms of their partnership, and in that instrument, to which defendant was not a party, they assumed to make their partnership relate back to 1st February, 1902. That mode of dealing between themselves could not alter defendant's position as a partner from 1st to 12th February, nor could it operate to give to defendant Stewart any higher rights in respect of the late partnership than he had under his agreement with defendant.

Taking, therefore, the instruments and the items of the claim, it is apparent that plaintiffs could maintain no right to recover them in the way in which it is sought to recover them in this action. As already pointed out, plaintiffs could not recover them as debts due to their partnership; and plaintiff Greig could not recover them as an individual. And furthermore, the agreement between defendant and plaintiff Stewart operated as a sale by defendant to plaintiff Stewart of defendant's interest as it stood on 12th February, whatever that interest might be, and it is clear that that interest was subject, on the taking of the accounts, to the allowance of those items against defendant.

It is argued, however, and the Divisional Court has come to the conclusion, that the sale by defendant to plaintiff Stewart was a sale of his interest as of 1st February, and by reference to a balance sheet, prepared on that date, shewing the respective interests of plaintiff Greig and defendant in the partnership. But the evidence does not sustain that view, even if it could be received as against the instrument.

No case was made for reforming the instrument, nor does there appear to be any good reason why it should be reformed. It is, no doubt, correct to say that reference was made to the balance sheet of 1st February, but it was only with a view to plaintiff Stewart seeing in a general way what defendant's substantial interest in the partnership amounted to. The amount agreed to be paid was certainly not based upon the balance sheet, which shewed an interest worth a much larger sum than \$4,500. And if the amount paid had been intended to represent the exact value of the interest of the defendant, it would have been necessary to consider

what had accrued to him out of the business between 1st and 12th February, a thing which, of course, was not either done or thought of . . . There was no representation to plaintiff Stewart by defendant as to the exact amount of his interest in the business, and there was no false suggestion or concealment to lead plaintiff Stewart to believe that no change, either as to payments on account of defendant or as to credits to which he was entitled, had occurred between 1st and 12th February.

It was suggested for plaintiffs that defendant had committed a virtual fraud by the manner in which the items now in dispute were dealt with during the period between 1st and 12th February, but there is really no ground for any such conclusion upon the evidence. The actual bargain and the real transaction between the parties was a sale by defendant and the purchase by plaintiff Stewart of the interest of defendant as it existed on 12th February.

Plaintiffs do not seek to set aside the sale, nor ask to have matters restored to their former position. They adhere to the sale, but seek by inference rather than by evidence to change the nature of the transaction and to deprive defendant of the position which he held as a partner between 1st and 12th February. And no case has been made for altering or reforming (as was said in argument) the instrument of agreement entered into by defendant, and that instrument standing, plaintiffs' claim fails.

The appeal should be allowed, and the judgment of the trial Judge restored, with costs throughout.

OSLER, J.A., gave reasons in writing for the same conclusion.

GARROW and MACLAREN, JJ.A., also concurred.

MEREDITH, J.A., dissented, for reasons stated in writing.

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C.A.

RE CARTWRIGHT AND TOWN OF NAPANEE.

RE KNIGHT AND TOWN OF NAPANEE.

Costs—Motion to Quash Municipal By-law—Intervening Statute Validating By-law—Costs Left to Discretion of Court—Costs in Court of Appeal.

Appeal by Sir Richard John Cartwright from order of MEREDITH, J. (6 O. W. R. 773), refusing to quash a by-law of the town of Napanee providing for the erection and equipment of a municipal electric light plant and for the issue of debentures; and appeal by Alfred Knight from order of MEREDITH, C.J., refusing Knight's application to quash the same by-law.

The appeals were heard by MOSS, C.J.O., OSLER and GARROW, JJ.A.

W. E. Middleton, for the appellants.

A. Bruce, K.C., and W. S. Herrington, K.C., for the town corporation.

Moss, C.J.O.:—After the argument on appeal, and while the cases were standing for judgment, the respondents procured the passage through the legislature of an Act, which has been duly assented to by the Lieutenant-Governor, and we have been furnished with a copy. There is a lengthy preamble, to which the curious may refer for a history of the proceedings up to and inclusive of the appeals to this Court.

By the enacting part, the by-law is confirmed and declared to be legal, valid, and binding on the corporation of the town of Napanee and the ratepayers thereof, notwithstanding any defect or error in substance or form or in any proceeding relating thereto or in the manner of passing the same. It is further enacted that nothing in the Act contained shall affect the costs of any appeal now pending, but the same shall be in the discretion of the Court, and may be determined and awarded in the same manner as if the Act had not been passed.

So far, therefore, as our views with regard to the objections made to the by-law are concerned, the legislation has rendered it of little consequence whether or not we give expression to them, for they cannot now affect the validity of the by-law. Probably it would have been better if the legislature, having gone so far, had seen fit to dispose of the whole matter, including the question of costs. But, as the determination of the costs has been left in our discretion, the parties are entitled to our award in respect of them.

In general the incidence of costs depends upon the result of the proceedings taken, and, as a rule, when that result is ascertained, little difficulty is experienced in determining upon which party the payment of the costs should fall. But here the respondents, by their action in obtaining curative legislation, have deprived the appellants of the chance of obtaining any substantial benefit from their appeals.

The learned Judges in the Court below appear to have been of the opinion that the respondents were in the wrong in neglecting to properly comply with the requirements which the Municipal Act imposes as conditions precedent to the passage of a valid by-law of the nature of that in question here. And in appeal the respondents were really compelled to rely upon the excuses put forward in their affidavits as sufficient to justify waiver of the provisions of the statute. Many of these had little or no bearing on the real question. No circumstances were shewn upon which the appellants could be held to be estopped of their rights as ratepayers; and their relations to the Napanee Water and Electric Light Company and the Napanee Gas Company, their attitude on the policy of the town in undertaking the construction and installation of an electric light plant, and their motives in moving against the by-law, were beside the

question. The appellants were quite within their rights in objecting when and as they did to the . . . municipality . . . assuming to act upon a by-law which was passed without due regard to the provisions of the statute.

On the whole we think that, in the exercise of our discretion, the costs of the appeals should be awarded to the appellants.

OSLER, J.A., gave reasons in writing for the same conclusion.

GARROW, J.A., also concurred.

CARTWRIGHT, MASTER.

JUNE 18TH, 1906.

CHAMBERS.

CAMPBELL v. CROIL.

Money in Court — Ownership of — Partnership — Judgment Creditors—Stop Orders—Creditors' Relief Act—Payment out to Sheriff for Distribution.

Motion by creditors of the firm of Croil & McCullough for payment out of Court of \$530 standing to the credit of defendant McCullough.

G. A. Stiles, Cornwall, for the applicants.

Grayson Smith, for defendant McCullough.

W. E. Middleton, for an opposing creditor.

THE MASTER:—The facts of this case appear from the reports to be found in 6 O. W. R. 933, 7 O. W. R. 379, 475.

There is still in Court \$530, which is standing to the credit of defendant McCullough, and was virtually determined to be his separate property by the report of the local Master, as well as by the order of 15th December last, affirmed as above. The Divisional Court did not in any way vary the disposition of the fund.

Against this there have been lodged 6 stop orders by creditors either of defendant McCullough or of Croil & McCul-

lough. The present motion is on behalf of all these creditors (except one, whose execution is against McCullough only) for an order for payment out to them. . . .

It was still contended that this money belonged to the firm of Croil & McCullough and should go to the creditors of the partnership only. But this is no longer an open question, so far as I can see.

The Creditors' Relief Act was passed in 1880. Its effect on money in Court against which execution creditors have lodged stop orders was first considered in *Dawson v. Moffatt*, 11 O. R. 484. There a Divisional Court decided that such money should be applied in accordance with the Act. They, however, directed distribution to be made by the local Master, and not by the sheriff.

In consequence, as it would seem, of this decision, the Act was amended by the addition of what is now sec. 24 of the Act as found in the last revision: see 49 Vict. ch. 16, sec. 37 (O.)

The effect of the Act itself on the rights of creditors was dealt with by the Court of Appeal in *Re McDonagh v. Jephson*, 16 A. R. 107.

It would seem clear that the proper order to make is that the money in question be paid out forthwith to the sheriff of Stormont, Dundas, and Glengarry, and be deemed to be money levied under execution against defendant McCullough and be dealt with as the Act provides.

As a motion was necessary to get the money out of Court, the costs of all parties may be added to their claims.

MAGEE, J.

JUNE 18TH, 1906.

CHAMBERS.

MURPHY v. CORRY.

Costs—Taxation—Stenographer's Fees—Evidence on Reference—Rule 1143—Consent—Certificate of Master.

Appeal by defendant from taxation of plaintiff's costs.

J. R. Code, for defendant.

R. McKay, for plaintiff.

MAGEE, J.:—I dismissed the appeal except as to the item of stenographer's fees on the reference before the local Master at Ottawa. . . .

Canadian Bank of Commerce v. Rolston, 4 O. L. R. 106, 110, 1 O. W. R. 351, does not help Mr. Code, as there the judgment itself deprived plaintiff of costs.

As to the stenographer's fees, it was stated by counsel that they had been incurred by consent of parties. If so, Rule 1143, as amended by Rule 1270, authorizes the allowance, on the certificate of the local Master. I have nothing to shew whether or not such consent was given, and cannot say that the taxing officer was wrong. The reasons for that officer's allowance of the various items was not before me. If plaintiff files the Master's certificate under Rule 1143, the appeal will be dismissed on this ground also, and the dismissal will be with costs. If such certificate be not filed, it should be shewn under what circumstances the stenographer was called in, and whether his fees were paid by the Master or by plaintiff; and the matter may be spoken to again.

MAGEE, J.

JUNE 18TH, 1906.

CHAMBERS.

RE GREER, GREER v. GREER.

Costs—Administration Proceeding—Taxed Costs in Lieu of Commission—Special Circumstances—Consent.

Motion by plaintiffs, on consent of all parties, for an order allowing taxed costs in lieu of the usual commission in a proceeding for the administration of the estate of Thomas Greer, deceased.

Grayson Smith, for plaintiffs.

MAGEE, J.:—The Master's certificate does not shew any unusual proceedings or difficulties such as arose in Wright v. Bell, 16 C. L. T. Occ. N. 193. The adding of parties, advertising for creditors, considering claims, and sale of lands, and examination of accounts, are the most ordinary experiences. It is stated that the executors' accounts were

intricate and badly kept, and gave rise to many questions, some difficult to determine, and required much time and trouble to adjust, and covered about 300 items on each side, the receipts being over \$9,000 and the disbursements about \$11,500, the estate now being about \$3,400 and some personalty specifically bequeathed, outside of the balance, if any, due from the surviving executor. Some 74 pages of evidence have been taken and 135 hours spent in attendance before the Master.

The Master had power to direct the accounts to be brought in in proper shape, and the parties beneficially interested should not be put to greater expense because of the executors' neglect of duty. It does not appear on what sum the commission under Rule 1146 would be calculated in this case: see *Re Brown*, 19 C. L. J. 367. But, as pointed out by the Chancellor, in *Re Stubbing*, 20 C. L. J. 193, the Rule was not intended to do strict justice, but only to afford a convenient mode of fixing the remuneration, though in some cases it might be too little, or, as alleged in that case, too much. And, as he points out, if a departure from it is desired, it should be asked at an early stage.

The solicitors for all parties agree in the application, but if, as is to be assumed, the clients also approve, there should be no difficulty in getting what may be considered proper remuneration. On the material before me I do not think Rule 1146 should be departed from.

MAGEE, J.

JUNE 18TH, 1906.

WEEKLY COURT.

RE MANUEL.

Will — Construction — Bequest to Widow — "Dower of One-third of my Estate" — Non-technical Use of "Dower" — Absolute Gift of One-third of Whole Estate.

Application by the executors for an order declaring the construction of the will of Obed Manuel, deceased, as to the interest taken by his widow thereunder in his estate.

M. F. Muir, Brantford, for the executors.

T. R. Slaght, K.C., for the widow and for Frederick Manuel, a legatee.

E. E. A. DuVernet, for Christiana Stoddard.

MAGEE, J.:—After appointing executors and directing them to pay his debts and funeral expenses and probate, the testator further directs them to sell “the whole of my real estate and personal property and chattels”—excepting certain household goods reserved for his wife—“turning the same into money.” The will then proceeds: “After the payment of my said debts, funeral expenses, etc., and my wife Sarah Manuel receives her dower of one-third of my estate, I give and bequeath to my wife Sarah Manuel the whole of the interest of my estate as long as she shall live (that is, the interest of the balance thereof after she receives her dower.) Upon the decease of my wife Sarah Manuel, I will and bequeath to my son two-thirds of the balance of my estate. And the remainder one-third of the balance of my estate I will and bequeath to my brothers Orman Manuel and Charles Manuel and to my sister Christiana Stoddard, to be divided between them share and share alike.”

The testator died on 25th April, 1905, and probate of the will was granted by the Surrogate Court of the county of Brant.

The widow contends that the word “dower” is not to be construed in its technical sense of a life interest in one-third of her husband’s realty, but that by it the testator intended one-third share not merely for life but absolutely, and not merely in his real estate, but in his whole estate real and personal. The son and the brother Orman Manuel acquiesce in this view. The other brother and the sister dispute it.

There is, no doubt, a very prevalent idea that a wife’s dower is a right to one-third of her husband’s property, and one would not be surprised to find the word used in that sense in a will written, as this one is said and appears to have been, by a non-professional person. The rule, however, is that “technical words or words of known legal import shall have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense: per Lord Denman in *Doe v. Gallini*, 5 B. & Ad. 640, citing Lord Redesdale in *Jesson v. Wright*, 2 Bligh 1.

We have to look within this will to see if the testator has furnished means for its interpretation, and must start with the presumption that he intended to dispose of his whole

estate. A construction which would result in intestacy as to any part of his estate is to be avoided.

It will, I think, be convenient to work backward in this case. At the wife's death "the balance of my estate" is divided among the testator's own relatives, his son and brothers and sister. What does he mean by "the balance?" The words imply that something has been taken out. As we are not to presume an intestacy, what has the testator done with that something which has been taken out to leave a "balance?" If the widow had only a life estate, that would end at her death, and, instead of there being only a balance to divide, the whole estate would be available. What then does he mean by the "balance" which he gives his relatives at his wife's death? One answer might be that it meant the balance after payment of the debts and expenses which he directs the executors to pay, and that would be a reasonable answer, in the absence of any other. In the words immediately preceding, the testator throws some light on what he means. There he gives to his wife for her life the interest of his estate, "that is, the interest of the balance thereof after she receives her dower." It is, I think, evident that the "balance" on which she is to receive interest during her life is the same "balance" which in the very next sentence is directed to be divided at her death. If so, it is not the whole of his estate, it is the balance thereof after she receives her "dower"—whatever that may mean. And here it may be noted that it is not the balance of the interest, but the "interest of the balance" which is given to her. Whatever he does mean by "dower," it is evidently something which reduces the fund of his estate during his wife's life, and that reduction continues after her death. If that be so, it must be part of the corpus of the estate. Then to find its meaning we go back, in the same sentence, to the phrase, the only other place in which it is used, and there it is spoken of as "her dower of one-third of my estate." Is it used there in a technical sense? If the words "my estate" are limited to real estate, there would be reason in such a construction. But the testator, within the next few lines, thrice uses the same words "my estate," and always manifestly referring to his whole estate resulting from both real and personal property. Only once previously has he used the word "estate," and then he expressly refers to "real estate." It is, I think, a reason-

able conclusion that he uses the words "my estate" throughout in the sense of "my whole estate," which is also their natural meaning. That being so, it follows that when he speaks of "her dower of one-third of my estate," he is not using the word "dower" in the technical sense which would limit it to realty.

We have thus a non-technical word used, the quantity of which—one-third of his estate—the testator here indicates, and we find that that one-third does not cease with the wife's life, but, as shewn in the subsequent dispositions in the will, is a permanent reduction of the corpus of the estate, and we are driven to the conclusion that the word "dower" is used in the sense of a gift or endowment (*vide Imp. Dict. sub "Dower," 4*) of one-third of the whole estate absolutely to the wife.

Against this conclusion Mr. DuVernet urged that the technical word should receive its ordinary technical construction, and argued with much force that the dower is coupled by the testator with debts and expenses, shewing in his mind a contemplation of only those paramount claims which must, in any event, come out of his estate and override any disposition he might make, and evincing an intention of dealing with his estate only subject to these claims. . . . I was much impressed by his argument, to which, it must be said, much colour is lent by the fact that there is not a direct but only an implied gift to the wife of the dower, and that it is not the only endowment or gift provided for her. I am not unmindful also of the consideration that the testator may well have contemplated a sale of his lands subject to her dower, or the payment to her of its value out of the proceeds of sale, thus leaving a "balance" to be disposed of. But the conclusion at which I have arrived is, I think, more concordant with the various expressions and dispositions in the will.

It was said . . . that the estate is small (under \$3,000), about one-third being personalty. That would not render less probable an intention to make such a provision for the wife as I have attributed to him.

It will be declared that under the will the widow is entitled absolutely to one-third of the proceeds of the real and personal property of the testator after payment of his

debts and funeral and testamentary expenses, and entitled during her life to the interest from the "balance" or two-thirds thereof.

Costs of all parties out of the estate.

ANGLIN, J.

JUNE 18TH, 1906.

WEEKLY COURT.

CONNOLLY v. CONNOR.

Evidence—Master's Office—Reference to Take Partnership Accounts—Preliminary Examination of Defendant as to Surcharge—Discretion of Master to Direct—Appeal—Place of Examination—Defendant Resident out of the Jurisdiction—Power to Direct Attendance at Place within Jurisdiction—Foreign Commission—Naming Master as Commissioner.

Appeal by defendant from a direction of the local Master at Ottawa requiring defendant, though resident in New York, to attend at Ottawa, and submit to preliminary examination before the Master, respecting items of surcharge and falsification upon plaintiff's accounts filed with the Master upon a reference to him in a partnership action.

T. A. Beament, Ottawa, for defendant.

Glyn Osler, Ottawa, for plaintiff.

ANGLIN, J.:—Defendant contends that the material before the Master was insufficient to enable him to exercise any reasonable discretion as to the necessity or propriety of a preliminary examination being had, and that in any event he had no jurisdiction to require the attendance of defendant at Ottawa to submit to such examination.

The discretion conferred upon the Master by Rules 668 and 669 is very wide. In the exercise of that discretion he has determined that a preliminary examination of defendant should now be had. Although the material does not, perhaps, specify with as much particularity as may be desirable the items of surcharge or falsification in respect of which this examination is sought, I must assume that

these were specified in argument before the Master. Plaintiff had in fact already specified them in writing upon a former abortive attempt to procure the examination of defendant. He must, he concedes, give formal notice of the items upon which he proposes to examine before proceeding with the examination: Daniel's Chy. Prac., 7th ed., p. 853. I should not, I think, interfere with the discretion exercised by the Master in determining that a preliminary examination of the defendant should now be had.

But I am unable to agree in his direction that defendant should attend for such examination at Ottawa. The proposed examination is said to be somewhat in the nature of an examination for discovery for the purpose of obtaining from defendant admissions, if possible, and, if not, such information as will the better enable plaintiff to prepare for and shape his case in the prosecution of the reference. The Court will not, under the code of Rules regulating discovery, require the attendance of a non-resident defendant at a point within the jurisdiction: *Lefurgey v. Great West Land Co.*, 7 O. W. R. 738. Although this code of Rules does not apply in the Master's office, yet the practice there should, I think, in such matters, by analogy, conform to the practice prescribed in regard to discovery. If, because of the right of a defendant not to be taken away from the locality of his residence for examination, the Court or a Judge will not require him to attend elsewhere for the ordinary examination for discovery, a fortiori it would seem that a Master or referee, in the conduct of a reference, should respect that right. The prima facie right of a non-resident defendant to have his testimony taken on commission for use at trial is well established. Moreover, Rule 499 (2) confers on the Master express power to direct that a commission shall issue to take this evidence, and in ordinary cases this is manifestly the practice which should be adopted.

But in the present instance the Master has apparently deemed it very desirable that the evidence of defendant should be taken before himself rather than before a commissioner to be appointed by him. If it were certain that defendant would appear as a witness before the Master at a later stage of the reference, it might not be so important that the Master should himself take the examination now proposed. But if, as is quite possible, defendant will not give any evidence upon the pending reference except such as he

may give upon the examination now in contemplation, it may be of the greatest moment that the Master should have the advantage of observing his demeanour as a witness and of controlling the conduct of his examination. . . . The Rules rather seem to contemplate that all evidence upon a reference shall be given *viva voce* before the Master or referee, unless upon special grounds it should be otherwise ordered: Rule 484.

The Master cannot direct the issue of a commission in which he shall himself be named as commissioner. It is possible that he could under Rule 485 make an order for the attendance of defendant for examination before himself at New York. This Rule, however, differs somewhat from the corresponding English Rule, No. 487, which enables the Court or a Judge to make an order for the examination of any witness or person before "the Court or Judge or any officer of the Court or any other person and at any place," whereas our Rule empowers the Court or a Judge to direct such examination "before any officer of the Court or any other person and at any place"—not contemplating, apparently, that such examination should be had before the Court or Judge pronouncing the order.

But the Court or a Judge under Rule 499 (1) may direct that a commission should issue for this purpose, and I see no reason why, in such a case as the present, the Master should not be named as the commissioner. The expense of having the Master himself execute such a commission will be only slightly, if at all, greater than would be entailed were the commission directed to some suitable person resident in New York. Probably both parties will consent to an order being pronounced for the issue of a commission to the Master. If not, and if plaintiff desires it, such order may issue upon plaintiff filing a certificate of the Master that it is, in his opinion, desirable that the examination of defendant should take place in his presence. Otherwise the Master may exercise the power conferred upon him by Rule 499 (2).

Success upon this appeal being divided, there will be no costs to either party. The costs of the commission, if issued to the Master, will be costs in the reference.

JUNE 18TH, 1906.

DIVISIONAL COURT.

GOODWIN v. CITY OF OTTAWA.

Assessment and Taxes—Income Assessment—Dividends on Shares in Ottawa Electric Company—Agreements between Company and City Corporation—Exemptions—Special Statutes—Assessment Act.

Appeal by plaintiff from judgment of TEETZEL, J., 7 O. W. R. 204, dismissing action.

H. S. Osler, K.C., for plaintiff.

T. McVeity, Ottawa, for defendants.

THE COURT (MULOCK, C.J., ANGLIN, J., CLUTE, J.), dismissed the appeal with costs.

MEREDITH, C.J.

JUNE 19TH, 1906.

CHAMBERS.

CROWN BANK OF CANADA v. BULL.

Summary Judgment—Rule 603—Defence—Failure to Shew—Refusal of Leave to File Second Affidavit—Conditional Leave to Defend—Payment into Court.

Appeal by plaintiffs from order of Master in Chambers, ante 8, upon a motion for summary judgment, giving plaintiffs conditional leave to defend.

F. Arnoldi, K.C., for plaintiffs.

J. F. Hollis, for defendant.

MEREDITH, C.J., dismissed the appeal; costs to defendant in the cause.

MEREDITH, C.J.

JUNE 19TH, 1906.

TRIAL.

TORONTO R. W. CO. v. CITY OF TORONTO.

Municipal Corporations—Expropriation of Land—Property of Street Railway Company Designed for Car Barn—Action to Restrain Council from Passing By-law—Failure to Shew Intention to Pass—Illegality of Proposed By-law—Remedy—Declaratory Judgment.

Plaintiffs alleged that they were the owners of certain lands in the city of Toronto which had been acquired and were required for the purpose of their undertaking, and were contended to be used for a "car barn;" that defendants were taking steps to appropriate these lands compulsorily for park purposes; that these steps were not being taken in good faith in the public interest; and that in any case defendants had no power to take the lands compulsorily; and plaintiffs claimed a declaration that defendants had no power to expropriate the lands; that the lands were "not liable to be expropriated;" that defendants were not entitled to raise the money required to pay for the lands without obtaining the approval of the ratepayers of a by-law for that purpose; that defendants' proceedings for expropriation were not in the public interest; and an injunction restraining defendants from taking any expropriation proceedings or interfering in any way with the use and enjoyment of the lands by plaintiffs for the purposes for which they had been acquired and were intended to be used.

The action was tried without a jury.

W. Laidlaw, K.C., for plaintiffs.

H. L. Drayton, for defendants.

MEREDITH, C.J.:— . . . Admissions were made to the effect that plaintiffs are the owners of the lands in question; that it was their intention to erect on them a car barn according to a plan which was submitted to the defendants' architect; and his report upon the plan, and certified copies of the minutes of the proceedings of the council and its board of control and committees, were also put in evidence.

These minutes shew that in the latter end of 1905 the council had under consideration the setting apart, as a public park or playground for the north-western section of the city, certain lands on the north-west corner of Bloor street and Christie street; and that on 18th October of that year a deputation of the property owners and ratepayers in the neighbourhood of the lands in question waited upon the board of control and presented a petition asking that a permit to plaintiffs for the erection of the car barn on the lands in question should be refused, and that permission should be also refused for the laying of tracks on certain neighbouring streets for the purpose of providing an entrance to the car barn.

This petition was on the same day referred to the corporation counsel "for an opinion stating exactly what power the city has or can exercise" in relation to the matter of the petition; and on 12th December following the board instructed the city architect not to deal with the plans for the car barn submitted by plaintiffs "pending the result of the proposed expropriation proceedings."

The committee on parks and exhibition, some time prior to 11th December, 1905, recommended that the lands in question, with two other lots, should be expropriated and dedicated for park and playground purposes, under the provisions of the statutes; and upon the instructions of the committee the city solicitor drafted a by-law for the purpose of giving effect to this recommendation.

On 11th December, 1905, the city council struck out the recommendation of the committee from its report, and referred it back to the committee for further consideration; and on the same day the writ in this action was issued.

The statement of claim contains no allegation that the city council intend to and will unless restrained pass the proposed by-law, and . . . the contrary is indicated by the action taken on 11th December . . .

No oral evidence was offered to establish the allegation that the proceedings of the board of control and the committees . . . were not taken in good faith, in the public interest, for the sole purpose of acquiring the lands in question for the purposes of a public park.

The documents themselves do not afford any such evidence. They shew, indeed, that the committees of the coun-

cil had under consideration, up to the time when the rate-payers' petition was presented, the acquisition of another property for the purpose of a public park or playground for the section of the city in which the lands in question are situate; but the documents also shew that the matter of acquiring that property was still under consideration on 11th December, 1905, for on that day the recommendation as to the other site was referred back to the committee for further consideration. The instructions of the board of control to the city architect not to deal with the plans "pending the result of the proposed expropriation proceedings" was not given until the day after this action was begun, and in any case does not appear to me to afford any evidence of bad faith or to shew that what was being done was dictated by anything else than the public interest.

I am far from thinking that the fact, if it were the fact, that the council, having under consideration the providing of a park in a particular section of the city, was induced to reject a site which it had under consideration and to choose another, because upon that other buildings of a character not desirable for a residential section were about to be put up, would afford any ground for the interference by the Court with a discretion which the legislature has vested in the council of the municipality and not in the Court, and which the Court ought not to and cannot properly interfere with, control, or supersede, unless the council is not in good faith exercising its powers but using them to serve an ulterior purpose, which it could not directly accomplish lawfully.

Nor is there any evidence to justify the Court in restraining the council . . . from passing the by-law which, it is suggested, but neither alleged nor proved, it intends to pass, even if plaintiffs be right in their contention that the lands in question cannot be compulsorily taken.

What right have I to assume that the council will do an illegal act? For all that appears, if plaintiffs are right, the council will be properly advised and will refrain from passing an illegal by-law. But if it should not so refrain, what harm will be done? The by-law, if illegal, may be quashed, and, if ultra vires, will, I apprehend, even though not quashed, give no authority to defendants to take the lands or interfere with plaintiffs' possession of them.

I do not deem it necessary to consider whether, as contended by plaintiffs' counsel, the lands in question are de-

voted to a public use, and therefore cannot be taken under the compulsory powers conferred upon municipalities by the Municipal Act, for the case is not one in which a judgment simply declaratory of the rights of the parties should be pronounced. That such a judgment may be pronounced is not open to question, but it is rarely done, and whether it shall or shall not be rests in the discretion of the Court.

That discretion, I think, should be exercised against pronouncing a declaratory judgment in this case. . . .

I do not wish to be understood as having formed any opinion for or against the contention of plaintiffs as to the land in question not being liable to be taken compulsorily, and I ought not, I think, to determine anything as to it, because, in my view, it is unnecessary for the purpose of deciding this case to do so.

The result is that the action is dismissed, and I see no reason why the costs should not follow the result.

JUNE 19TH, 1906.

DIVISIONAL COURT.

RE VANDYKE AND VILLAGE OF GRIMSBY.

Municipal Corporations—Local Option By-law—Irregularities—Publication of Notice of Day for Taking Votes—Mistake—Correction—Passing of By-law by Council—Validity of Election of Members—De Facto Councillors—Signing of By-law by Reeve—Resignation—Acceptance.

Appeal by J. W. Vandyke from order of TEETZEL, J., 7 O. W. R. 739, dismissing the appellants' motion to quash a local option by-law of the village corporation.

J. Haverson, K.C., for appellant.

W. E. Middleton and T. Urquhart, for the village corporation.

THE COURT (MULOCK, C.J., ANGLIN, J., CLUTE, J.), dismissed the appeal with costs.

JUNE 19TH, 1906.

DIVISIONAL COURT.

PASSMORE v. CITY OF HAMILTON.

Water and Watercourses—Municipal Corporation—Sewerage Works—Construction of Dam and Ditch—Overflow of Private Lands—Injury to Crops—Liability—Cause of Injury—Finding of Referee—Natural or Artificial Watercourse—Leave and License—Acquiescence—Evidence.

Appeal by plaintiff from order of BRITTON, J., 6 O. W. R. 847, setting aside report of S. F. Lazier, K.C., special referee, and directing that the action be dismissed with costs.

W. A. H. Duff, Hamilton, and J. Harrison, Hamilton, for plaintiff.

W. R. Riddell, K.C., for defendants.

The judgment of the Court (MEREDITH, C.J., MACLAREN, J.A., TEETZEL, J.), was delivered by

MEREDITH, C.J.:—The appellant is the owner of the undivided four-fifths of a farm, consisting of parts of lots 13 and 14 in the 4th concession of Barton, and at the time the acts of defendants of which he complains were done was in occupation of the farm.

His complaint is that defendants wrongfully built on the easterly line of a road called "the Stone road," without the limit of their municipality, and within the township of Barton, a stone wall which had the effect of damming back the waters which before then flowed northerly in a natural watercourse on the east side of the Stone road, and were discharged over the brow of the mountain, and eventually found their way down its side into the city of Hamilton, and of forcing them eastward into a drain which defendants had constructed in a highway called Moore street, which runs at right angles to the Stone road, and from it easterly through lots 13 and 14; that this drain had not sufficient fall or capacity to carry away the waters which were diverted into it from the watercourse on the Stone road; that the result of this was that Moore street and the land adjacent to it were overflowed by these waters whenever a heavy fall

of rain occurred, as well as when the melting snow and ice were passing away in the spring of the year; and that defendants had also constructed an embankment on plaintiff's land on the boundary between it and Moore street immediately north of the drain, and several feet in height, which had the effect of preventing the waters carried eastward from flowing, as they otherwise would have done, northward in the natural depressions on plaintiff's land north of Moore street, and ultimately over the mountain, and of causing those waters to be penned back and to stand upon Moore street and the land of plaintiff south of that street, to a considerable depth and covering a large area.

In respect of these alleged wrongs plaintiff claims damages: (1) for injury done to his crops growing upon the part of his farm lying south of Moore street in . . . January, 1904, owing to its having been overflowed by the waters which were carried eastward by defendants' works and penned back by the embankment; and (2) for the trespass to his land by the making of the embankment on it, and other injuries to his land north of Moore street, alleged to have been caused by the embankment, as well as for the cost of removing the earth which had been thrown up to form it.

Plaintiff also claims an injunction to restrain defendants from continuing their works to his prejudice.

The action . . . was referred to Mr. Lazier for trial.

The referee found in favour of plaintiff, and assessed his damages at \$548.12, but did not give effect to his claim for an injunction.

In reaching this conclusion, the referee found that the drain or ditch on the east side of the Stone road was a natural watercourse.

On appeal my brother Britton reached a different conclusion on this latter point; and he also decided that the injury to plaintiff's crops, of which he complains, was not proved to have been caused by the works of defendants; and he found that any case the defence of leave and license . . . was established.

I agree with the conclusion of my brother Britton that a natural watercourse was not proved to exist, and that, as plaintiff alleged in his pleading, what is now alleged to be

a natural watercourse is but "a deep ditch" for the carrying off of the surface water. Everything points to the conclusion that the ditch is an artificial one, probably made at the time the Stone road was built, for the drainage of the road and the carrying off of the surface water from the neighbouring lands, and to prevent the road from being flooded by these waters.

I am, however, unable to agree with the view of my learned brother that the injury to plaintiff's crops was not proved to have been caused by the works which defendants have made. There was, no doubt, some evidence that pointed to another cause for the damming back of the water which flooded the land in which the crops were, viz., the existence of banks of snow and ice, which themselves, it is said, formed a dam and prevented the waters from flowing northward, as well as caused them to be penned back and to lie on the land of plaintiff south of Moore street. There was, however, a very considerable body of evidence adduced to shew that it was not these banks of snow and ice which did the injury to plaintiff, and that it was caused by the works of defendants. The referee saw and heard the witnesses, and, upon conflicting testimony and after a view of the premises, found in favour of the contention supported by plaintiff and his witnesses, and that finding, I think, ought not to have been disturbed. An independent review of the evidence also leads me to the conclusion that plaintiff satisfied the onus which rested upon him of proving that the damage done to his crops was occasioned by the works of defendants.

I have the misfortune also to differ from the view of my brother Britton that leave and license to do the acts complained of was made out.

One is not left, in order to determine whether defendants had the leave and license of the predecessor in title of plaintiff to do the acts of which plaintiff is now complaining, to draw inferences from oral testimony, or even from acts of more or less doubtful import. The circumstances under which the Moore street drain was constructed, and the extent of the authority which the council of the township of Barton assumed to give to defendants to construct it, appear in the records of that body. The authority was given by resolution of 5th October, 1878. By that resolution it is provided that defendants shall construct the "ditch in a workmanlike manner, and keep it in such repair that the

water shall flow in a uniform descending grade of not less than 5 feet in the mile, in an eastwardly direction to the Hamilton and North-Western Railway," and that they shall fence the drain, and be responsible for all damages which private persons should sustain in consequence of the drain between the Stone road and the side line between lots 12 and 13 (the Moore street drain).

Defendants have wholly disregarded their undertaking as to the fall to be given to the drain, and, instead of one of 5 feet, have provided scarcely any fall in that part of the drain which passes through lots 13 and 14.

In order to enable defendants to carry out one of the terms of their agreement with the corporation of Barton, it was necessary for them to acquire a strip of land about 15 feet wide, lying south of Moore street as it then existed, and extending from east to west across lots 13 and 14. They accordingly bought this strip of land, and obtained a conveyance of it from Joseph Jardine and his wife and the adult children of Richard Passmore, deceased, who had been the owner, and they also obtained a bond from their grantors binding the latter for the conveyance by 4 of the children of Passmore who were minors, as they should respectively attain the age of 21, of their interests in the land conveyed.

The land of which plaintiff is now a four-fifths undivided owner, and this strip, had belonged, as I have said, to the father of plaintiff, who died on 14th August, 1872, having devised his real estate to his wife Elizabeth (who afterwards became the wife of Joseph Jardine) for life, and directed that it, with the exception of 10 acres, should after her death be equally divided among his surviving children.

The bond recites that defendants "have excavated a ditch along the northerly side of the road known as Moore street, on the top of the mountain, running in an easterly direction from the Hamilton and Port Dover stone road across lots 14 and 13 in the 4th concession of the township of Barton, and have obtained from the municipality of the township of Barton permission to excavate such ditch for the purpose of carrying off and diverting freshets of water from running over the mountain precipice and damaging property in the city of Hamilton, the corporation of the city of Hamilton agreeing to pay for a strip of land of equal width on the southerly side of the said road known as Moore street, said strip being 15 feet in width."

Putting the case on the highest ground possible for the respondents, reading these documents together, if any license is to be inferred from what was done or agreed to by the then owners, who were parties to the agreement with the respondents, it was, I think, clearly only a license to do what the resolution of the council of Barton had assumed to authorize defendants to do, and was, therefore, a license to construct a ditch in accordance with the terms of that resolution and subject to compensation being paid to property owners for any damages caused by it. I do not wish, however, to be understood as saying that, even if this were otherwise, the defence of leave and license would be made out. The license, if any, was by parol, and plaintiff was not a party to the giving of it, and it is at least open to question whether the license, if any, by the persons who joined in the bond was not revoked when they conveyed away their interests in the land.

My brother Britton seems also to have thought that plaintiff had acquiesced in what defendants have done, and that coupling his acquiescence with the leave that, as he found, had been given, plaintiff was not entitled to recover for the damage done to his crops in 1904, even if the parol license alone would not have had the effect of disentitling him to recover.

The tenant for life, it may be noticed here, did not die until 3rd January, 1896, and it is difficult to see how the fact that no action was brought in her lifetime should make against the claim which plaintiff has put forward in this action.

Nor do I understand how acquiescence short of such delay as will constitute a statutory bar to recovery, or as gives a prescriptive right, can affect the right of plaintiff to recover damages by what under the old practice would be an action at law. Acquiescence may be an answer to a claim for equitable relief, and full effect has been given to any acquiescence with which plaintiff may be chargeable by the refusal of the relief by injunction which he claimed, and for the reasons already given an agreement to grant the right claimed by defendants is not to be inferred from acquiescence in this case.

It was argued by Mr. Riddell that the waters which were brought down by the ditch on the Stone road were flood

waters, which defendants were entitled to prevent from flowing into the city of Hamilton, to the damage and injury of the streets there, and that for that purpose it was lawful for them to erect a dam in the Stone road, and that in "fighting the common enemy" they were not answerable for injuries to other property owners caused by the existence of the barricade which they had set up.

Assuming that such is the law, where the property owner erects a barricade on his own land, no authority was referred to to shew that he has the right to put up a barricade at a distance from his own land with the same immunity from the consequences of injury to others caused by it, and on principle it appears to me that no such right exists. If he may erect the barricade 100 yards away from his own property, why not a mile away, or a further distance? The barrier erected on his own land might injure only his immediate neighbour, while, if erected at the greater distance, might injure some one who would escape altogether if the barrier were placed on the owner's land.

However, it is not, in the view I take, necessary to pursue this inquiry. The entry on the land now owned by plaintiff and the construction of the embankment there and its subsequent maintenance were clearly wrongful acts of the defendants, unless they are in a position to justify what they have done under some authority derived from the owners which conferred that right, and none has been pleaded except the defence of leave and license, with which I have already dealt, and none has been proved.

The embankment and the drain on Moore street were the proximate causes of the flooding of plaintiff's land, and it was not argued, as indeed it could not well be, that these works were such as a land owner may lawfully erect to ward off flood waters, even if the right to bar them off be as wide as that claimed by defendants' counsel.

It may be that all the acts done by defendants, if they were done under the authority of the council of Barton, must stand in the same position as if they were the acts of that municipality, and, if that be so, defendants, I think, would be clearly without defence, because Barton, having brought the surface waters from the neighbouring lands into the road drain on the Stone road, clearly would have no right to dam them back and force them eastward, where they would otherwise not have gone, at all events in so large

a volume, and that by means of a drain quite insufficient to carry them away, nor would that municipality have had any right to construct the emankment on the land of plaintiff.

I have come to no conclusion on this point, but suggest it as possibly a formidable difficulty in the way of defendants succeeding, if the grounds upon which I am proceeding are untenable.

On the whole, I am of opinion that the appeal should be allowed with costs, the order of my brother Britton be reversed, and that plaintiff should have judgment against defendants for the damages as assessed by the referee, with costs.

MABEE, J.

JUNE 19TH, 1906.

TRIAL.

CORBETT v. CORBETT.

Improvements—Mistake of Title—Improvements made after Demand of Possession—Delay in Bringing Action—Lien—Reference—Costs.

Action to recover possession of land and for mesne profits, and counterclaim by defendant, in the event of plaintiff succeeding, for the value of improvements made under a mistake of title.

M. J. Gorman, K.C., and A. E. Lussier, Ottawa, for plaintiff.

G. F. Henderson, Ottawa, for defendant.

MABEE, J.:—At the trial I disposed of the questions arising in this action, save as to what rights defendant had under the statute for improvements made under mistake of title. Defendant made the improvements in good faith, and in circumstances that entitled her to a reference to ascertain the amount, she supposing that after the death of the tenant for life the property would belong to her under her husband's will, and acting under this mistake is said to have expended moneys in improvements during the lifetime of May Corbett, who owned the life estate. I think she is entitled to have an account of these expenditures taken. . . .

Re Smith's Trusts, 4 O. R. 518, is authority that repairs made by the tenant for life, however substantial and lasting, are not within the statute, but that is not this case; here defendant was living upon the property with the life tenant, and the expenditures are said to have been made by defendant, and not by the life tenant, and I think were made under the mistaken belief that the property either was hers or would be hers upon the death of May Corbett. The latter died in August, 1896, and during various years down to 1905 defendant and her daughter, who resided with her, have made permanent improvements.

On 18th February, 1898, a notice was served upon defendant at the instance of plaintiff to the effect that he demanded possession, and that unless such possession was given quietly, within a reasonable time, he would be compelled to issue a writ of ejectment without further notice. Defendant denied ever receiving such a notice, but it was shewn that on 19th February Mr. MacCracken, acting for defendant, wrote the following letter to plaintiff's solicitor: "I understand that you are acting for some person named James Corbett, who assumes to claim some property occupied by Mrs. Ellen Corbett on the corner of Dalhousie and Redpath streets. Will you kindly call and see me with reference to the matter or let me know when I can see you to ascertain how the claim is being made." Defendant is unable to read or write, and from defects of memory that were apparent during her examination I think she had entirely forgotten receiving the notice or consulting her solicitor about it. Nothing further was done, no information was supplied or particulars given of the claim, and the next defendant heard of the matter was a written demand for possession served upon her on 18th February, 1905, and during this 7 years the bulk of the improvements were made. The writ was issued on 16th September, 1905, and it does not appear that any expenditures were made between February and September, 1905.

Plaintiff contends that defendant cannot be allowed for expenditures made after and in the face of his notice of February, 1898. . . .

[O'Grady v. McCaffery, 2 O. R. 309, distinguished.]

The words of the statute (R. S. O. 1897 ch. 119, sec. 30) are: "In every case in which a person makes lasting

improvements on land under the belief that the land is his own . . . he shall be entitled to a lien," etc. . . .

[Reference to *Chandler v. Gibson*, 2 O. L. R. 442.]

In my view, the receipt of this notice by defendant is an element in determining the bona fides of her belief, but does not necessarily debar her from compensation for improvements made since its service upon her. The notice states that unless she gives up possession within a "reasonable time" a writ will issue, and, doubtless, if the matter had been prosecuted and a writ issued within a "reasonable time," so that there was some connection between the notice and the action, the defendant would not have been entitled for improvements made after service upon her of the notice, as that might fairly be regarded as the beginning of the litigation; but here nearly 8 years elapsed before the writ was issued, and exactly 7 years between the service of the first and second demands. In view of the delay, and no explanation having been given to defendant or her solicitor of how plaintiff claimed title, I think it was not unreasonable for defendant to continue under the belief that the land was hers.

In this case a search in the registry office would not disclose any defect in defendant's title. The difficulty arose over the will of Martin Corbett, made in 1861, which provided that, subject to the life estate of his widow, the lands should go to the "eldest son of Michael Corbett." Defendant claimed under the will of her husband, believing him to be the eldest son of Michael. In this she appears to have been mistaken. In these circumstances, the notice of February, 1898, could in no way fairly be regarded as establishing that it was not reasonable for defendant to continue under the impression that the property was hers.

Some of the moneys expended were said to be those of a widowed daughter of defendant living with her. The facts are not sufficiently before me to dispose of the contention of plaintiff that defendant cannot claim for those moneys: the Master will consider that.

In the result, then, the reference will be to the Master at Ottawa to ascertain what sum defendant is entitled to for improvements upon the property in question, including the moneys expended by the daughter if the Master considers they were expended under circumstances entitling defendant

to claim for them. The Master will also take an account of the rents and profits chargeable against defendant. The latter will be declared entitled to a lien for the balance found in her favour, if any.

The costs of the reference, if the parties cannot agree upon the amounts, will be reserved until after the Master has made his report. There will be no costs of the action, success being divided, defendant denying plaintiff's title and plaintiff resisting the claim for compensation.

MABEE, J.

JUNE 20TH, 1906.

TRIAL.

DE ROSIERS v. DE CALLES.

Vendor and Purchaser—Contract for Sale of Land—Mistake of Vendor as to Quantity—Specific Performance as to Part only of Land Contracted to be Sold.

Action for specific performance by defendant of a contract for the sale by defendant to plaintiff of certain land.

F. H. Chrysler, K.C., and N. G. Larmonth, Ottawa, for plaintiff.

N. A. Belcourt, K.C., for defendant.

MABEE, J.:—The agreement provides for the sale by defendant to plaintiff for \$5,000 of "all that property belonging to the said A. D. De Calles situate on the north side of Daly avenue in the said city of Ottawa, being street No. 171 Daly avenue." Defendant owned lot No. 16 on the north side of Daly avenue and lot No. 16 on the south side of Besserer street. These lots abut each other, and extend from street to street, the house being on the Daly street lot, facing that street, and being No. 171. There is no apparent dividing line between these lots; the only entrance is from Daly avenue. Fences surround the entire property, and both lots are used with and form the land surrounding the house known as No. 171. Defendant owns no other property on the north side of Daly avenue. Defendant is willing to convey

to plaintiff the lot facing on Daly avenue with the house, contending that plaintiff is not entitled to the lot facing on Besserer street; that he did not intend selling the lot, and did not understand it to be included in the agreement; he alleges that he values the whole property at about \$7,500; and another witness, Colonel Gordeau, thinks it worth \$6,000 to \$6,500.

The good faith of defendant was attacked by plaintiff's counsel, and it was argued that he intended the agreement to cover the whole property. Against the objection of defendant's counsel, I permitted evidence to be given shewing the conversation between the parties at the time the bargain was discussed, plaintiff and her husband both stating that at that time defendant told them the property he was asking \$5,000 for was 66 feet by 200 (this is the size of the two lots), and it was argued that from that statement defendant must be taken to have fully understood what he was selling. Defendant denies making the statement, and a young lady, defendant's secretary, who was present most of the time, states that no such statement was made in her presence. Defendant says he was not taking much interest in the conversation, as he did not look upon plaintiff or her husband as likely to buy the property. After the interview plaintiff went to her solicitor and had the agreement prepared; it was taken to defendant and executed by him, being also executed by plaintiff.

I think both parties were and are acting in entire good faith; that plaintiff expected she was to get the whole property, and had no idea of offering \$5,000 for the Daly avenue lot alone; and I think also that defendant was under the belief that he was selling the Daly avenue lot alone, and did not understand that the Besserer street lot was included in either the verbal negotiations or covered by the agreement he signed; if he made the statement regarding the size of the lot, it was not done with any intention of misleading plaintiff or her husband, and was not intended as a representation that he was offering both lots for the \$5,000. Defendant, although a man of education and refinement, is not a man of business, and at the time that plaintiff thought he was selling the Besserer lot to her, one-half of it was under a verbal option to Colonel Gordeau, the owner of an adjoining residence, at \$1,000 or \$1,200.

Having regard to this and the value of the whole property, together with the statement of defendant, which I unhesitatingly accept, it is perfectly apparent that he was under a

mistake in connection with the whole bargain, and I do not think this view is in any way shaken by the subsequent correspondence between the parties. This mistake that defendant has made was in no way caused by plaintiff, and she is in no way to blame for the position of matters. Is she entitled, in these circumstances, to specific performance?

I think the evidence discloses the whole property to have been worth at the date of the contract at least \$6,000; so if, upon the authorities, plaintiff is entitled to performance, she will have gained an advantage over defendant to at least the sum of \$1,000. It is said that to entitle a plaintiff to specific performance the contract must not be hard or unconscionable; it must be free from mistake, for where there is mistake there is not that consent which is essential to a contract in equity: *non videntur qui errant consentire*: Fry, 4th ed., p. 329; *Wilding v. Sanderson*, [1897] 2 Ch. 534; . . . *Hickman v. Berens*, [1895] 2 Ch. 638.

The Courts will not enforce specific performance against a defendant even where the mistake is purely due to the defendant, and the plaintiff is in no way to blame: *Jones v. Rimmer*, 14 Ch. D. at p. 592.

The result, therefore, is, that plaintiff cannot have this contract enforced against defendant in the manner claimed. If plaintiff desires, she may take a conveyance of the Daly avenue lot at \$5,000; otherwise the action must be dismissed, and defendant must return to plaintiff the money paid to him, with interest from the time he received it. Each party will bear his and her own costs of the litigation.

JUNE 20TH, 1906.

DIVISIONAL COURT.

THOMAS v. CANADIAN PACIFIC R. W. CO.

BUSH v. CANADIAN PACIFIC R. W. CO.

Malicious Arrest and Prosecution — Arrest by Person Employed as Watchman by and Appointed Constable on Recommendation of Railway Company — Liability of Railway Company — Express or Implied Authority — Interference — Railway Act.

Appeals by plaintiffs from judgments of MORGAN, Jun. Co. C.J., withdrawing from the jury and dismissing actions

in the County Court of York for false arrest and malicious prosecution of plaintiffs.

The appeals were heard by MULOCK, C.J., BRITTON, J., MABEE, J.

W. T. J. Lee, for plaintiffs.

Shirley Denison, for defendants.

MULOCK, C.J.:— . . . One James Jardine was a watchman in the service of defendants, and, under the provisions of sec. 241 of the Railway Act, 1903, had apparently been appointed constable to act upon and along the line of defendants' railway. This section provides that such an appointment may be made on the application and recommendation of the railway company desiring it, and requires the person so appointed to take an oath or declaration in the form or to the effect therein set forth. . . . Jardine, on 29th April, 1904, made oath to his appointment, and on 2nd September, 1904, caused this affidavit to be filed in the office of the clerk of the peace for the county of York. It does not appear when he ceased to be such constable, and it may be assumed that he was still constable at the time of the arrest and prosecution in question.

There is evidence from which the jury might have concluded that Jardine was in defendants' employment as watchman on Sunday 11th December, 1904. On the evening of that day he met plaintiffs near the corner of King and Jordan streets, in Toronto, when he seized them both, saying "I want you," and marched them off to the police station. On arrival there, he handed them over to the sergeant in charge, saying, "Here's two more." Plaintiffs were detained in custody until the following Wednesday. On 12th December Jardine swore to an information charging plaintiffs with having broken into a freight car of defendants with the intent of stealing therefrom, in this information describing himself as "James Jardine, C. P. R. constable, of the city of Toronto." Plaintiffs were remanded until 16th December, when their cases were proceeded with. On this inquiry Jardine swore that he was a "C. P. R. constable, and that a freight car of the C. P. R." in Toronto had been broken into, but his evidence in no way connected plaintiffs with the matter, and they were thereupon discharged, and these

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actions are brought because of Jardine's part in the arrest and prosecution in question.

In order to establish liability against defendants, it is not sufficient to shew merely that Jardine was in their employment, but plaintiffs must shew that he acted with defendants' authority, express or implied. . . .

[Reference to *Roe v. Birkenhead and Lancashire R. W. Co.*, 7 Ex. 36.]

It was not attempted to be shewn that Jardine had any express authority, and the onus is upon plaintiffs to give evidence justifying the jury in finding that from the nature of his duties he had implied authority from defendants to make the arrest: *Goff v. Great Northern R. W. Co.*, 3 E. & E. 674.

Jardine was at the same time watchman for defendants and constable appointed under the statute with such duties and powers as the Act conferred upon him.

This dual position involves a consideration of his implied authority in each capacity. As watchman, deriving authority from the company, it was his duty to protect the property on their premises which they had intrusted to his care, and he was thus clothed with implied authority from them to do such reasonable acts as he might, on the exigency of the moment, deem necessary in order to prevent injury to their property. If, therefore, he had found plaintiffs on the premises of defendants, endeavouring to steal the property placed by them under his charge, it would have been within the scope of his authority, as their servant, to arrest plaintiffs, if he deemed it advisable so to do, in order to perform his duty of watchman of preventing injury to the property in question. But such was the limit of his implied authority, and any of acts his in excess of such authority would not bind defendants: *Poulton v. London and South-Western R. W. Co.*, L. R. 2 Q. B. 540; *Lyden v. McGee*, 16 O. R. 108; *Abraham v. Deakin*, [1891] 1 Q. B. 517; *Bank of New South Wales v. Ousten*, 4 App. Cas. 270. . . .

Here the arrest was made after the attempted robbery and in a public street some distance from defendants' premises, and on the following day Jardine swore to an information charging plaintiffs with having endeavoured to break into a freight car with intent to steal therefrom. There was no evidence that anything in fact had been stolen.

Defendants' property was safe before the arrest. Therefore, that act and the subsequent events complained of were not in the interests of defendants, either for the purpose of preventing a theft or of recovering stolen property; but were simply punitive in their character, in vindication of the law, an object in which defendants in common with the general public were interested.

Under the Railway Act defendants had no authority to do what Jardine had thus done, and it ought not to be inferred that defendants had conferred on him authority to do what they could not themselves lawfully do: *Allan v. London and South-Western R. W. Co.*, L. R. 6 Q. B. 65; *Jones v. Duck*, *The Times*, 16th March, 1900.

I therefore think that, as watchman, Jardine had no implied authority from defendants either to arrest or prosecute plaintiffs. . . .

The next question is, whether, assuming that the arrest and prosecution were made by Jardine in his capacity of constable, the defendants are liable therefor. At their instance he was, under the provisions of sec. 241 of the Railway Act, appointed to act as constable on and along their railway.

Sub-section 2 empowers a person so appointed to "act as constable for the preservation of the peace and for the security of persons and property against unlawful acts on such railway and on any of the works belonging thereto . . . and in all places not more than a quarter of a mile distant from such railway, and shall have all such powers, protections, and privileges for the apprehending of offenders, as well by night as by day, and for doing all things for the prevention, discovery, and prosecution of offences, and for the keeping of the peace, which any constable duly appointed has within his constablewick."

Sub-section 2 enacts that "every such constable who is guilty of any neglect or breach of duty in his office of constable shall be liable on summary conviction . . . to a penalty . . ."

There was no evidence that defendants gave any instructions or directions to Jardine in the discharge of his duties as constable at any time. On the contrary, they appear to have wholly abstained from interfering with him, leaving

him to perform, in accordance with his own judgment, the duties cast upon him by the statute.

Thus, Jardine having no express authority from defendants to make the arrest and lay the information, they would not be liable, unless an implication of authority would arise because of their having brought about his appointment as constable.

In *Hart v. Bridgeport*, 13 Blachford Cir. Ct. R. 294, *Eastman v. Meredith*, 36 N. H. 284, *Maximilian v. New York*, 62 N. Y. 160, *Baker v. West Chicago Commissioners*, 66 Ill. App. 507, and numerous other cases that have come before the Courts of the United States, the view has been expressed that the preservation of the peace, protection of property, prevention and punishment of crime, are public duties, in the discharge of which the whole community is interested, and which the State is bound to perform for the benefit of society generally, and that if, for convenience, the State delegates to municipalities the power of appointing peace officers, these latter, in the exercise or non-exercise of their police powers, are not servants or officers of the municipalities, which may have appointed them, but which have no control over them in the discharge of their duties.

For the like reason, such peace officers appointed on the recommendation, under the authority of competent legislation, of a railway company, must be regarded as officers of the law, and not as servants of the company.

Under the Act in question, whilst the railway company may apply to the authorities to appoint constables, and may in that connection make recommendations of persons for appointment, the company have no power to appoint . . .

The only interference allowed by the statute to the company is to dismiss "any such constable who is acting on such railway." . . .

Unless, therefore, the company should actively interfere by directing his movements, he is no more an agent of the company than he would be if at the request of a private citizen he were detailed by his superior officer to guard a man's private property.

There is no evidence to shew that in either of these cases defendants exercised any control over Jardine's action as

constable, and therefore, as held in *O'Donnell v. Canada Foundry Co.*, 5 O. W. R. 216, they are not liable therefor.

In *Dennison v. Canadian Pacific R. W. Co.*, 36 N. B. Reps. 263, Macleod, J., expressed the view that a railway company, simply because of procuring the appointment of a constable under the Act, did not thereby become responsible for his action as constable.

I think the appeal should be dismissed with costs.

BRITTON, J., gave reasons in writing for the same conclusion.

MABEE, J., also concurred.

JUNE 20TH, 1906

DIVISIONAL COURT.

ROSSI v. OTTAWA ELECTRIC R. W. CO.

Street Railways—Injury to Passenger—Negligence in Operating Car—Contributory Negligence—Conflicting Evidence—Findings of Jury—Refusal of Court to Interfere.

Appeal by defendants from judgment of TEETZEL, J., at the trial, in favour of plaintiff, upon the findings of a jury, for \$750, in an action for negligence.

H. S. Osler, K.C., for defendants.

A. E. Fripp, Ottawa, for plaintiff.

The judgment of the Court (MULOCK, C.J., BRITTON, J., MABEE, J.), was delivered by

MULOCK, C.J.:— . . . The case as shewn by plaintiff at the trial was, briefly, as follows:—On 3rd September, 1905, plaintiff desired to visit the hospital on Water street in Ottawa, and for that purpose became a passenger on one of defendants' cars, changing from this to another car at the intersection of Rideau and Sussex streets. This latter street, after proceeding northerly a short distance, crosses Water street. On plaintiff entering the car, she gave the

conductor to understand that she desired to alight at Water street. When the car was within about 10 feet of the south side of Water street, the conductor rang the bell once, which was the signal for it to stop when it reached the proper stopping place, being at the north or far side of Water street. Thereupon its speed slackened, when a young man got off the car, which was still in motion. Plaintiff, however, reached the conclusion that it was not going to stop, and motioned to the conductor, who was some seats behind her, giving him a signal. The conductor looked at her, but did nothing. Plaintiff then arose and pulled the bell cord once, causing one sound on the gong—the proper signal to the motorman to stop the car. The car was an open car; the seats running across it, and passengers alighted by stepping out from between the seats upon the step, which ran lengthwise with the car. Plaintiff, having thus rung the bell, looked towards the conductor, who was at the rear end of the car, and she says that, instead of stopping, the car suddenly started, with a jerk, to go faster, which threw her off the car upon the street, when she sustained the injuries on account of which this action is brought. She stated that at the time of her thus being thrown off, she was standing about a foot from the edge of the car, that is, not upon the step, but between the seats, and was waiting for the car to stop.

There was some conflict of evidence as to whether plaintiff rang the bell once or twice, but, in view of the findings of the jury, it does not appear to me material to deal with that phase of the evidence.

The questions submitted to the jury and the answers thereto are as follows:

"1. Was the defendant company guilty of any negligence? A. Yes.

"2. If yes, in what did such negligence consist? A.—By not stopping car in due time and motorman starting car too quick while almost stopped.

"3. If the defendant company was guilty of negligence, did such negligence cause the plaintiff's injury? A.—Yes.

"4. Was the plaintiff guilty of any negligence which caused her injury? A.—No.

"5. If yes, in what did such negligence consist? A.—(No answer).

"6. At what sum do you fix the damages which the plaintiff suffered? A.—\$750." Jury 10 to 2.

The only negligence found by the jury which would afford the plaintiff a cause of action against defendants is that part of the answer to question 2, which finds defendants guilty of negligence because of the "motorman starting the car too quick while almost stopped." The earlier part of the answer, "by not stopping car in due time," could not be the proximate cause of the injury.

In view of plaintiff's evidence I do not see how the case could have been withdrawn from the jury. Plaintiff was by right a passenger on the car, and it was the duty of defendants to exercise reasonable care in its operation, so that she would not be exposed to unnecessary danger. Her evidence shews that the speed of the car was suddenly increased, and to such an extent as to throw her from the car to the street with great violence, causing serious injury. This testimony was evidence of a breach of duty on defendants' part, and the case was properly left to the jury.

Defendants endeavoured to prove that, instead of being thrown off by the unskilful management of the car, plaintiff jumped off whilst the car was in motion, and thereby by her own negligence caused the accident.

If the jury had accepted defendants' view of the occurrence, it could not be said that there was no evidence to support it, but they have not done so; on the contrary, they have rejected it, and have accepted the view presented by plaintiff that she was thrown from the car by reason of its negligent management. Where a case admits of two conflicting views, it is for the jury to consider all the facts and circumstances and to determine which is the proper inference to be drawn from the evidence: *Dublin, Wicklow, and Wexford R. W. Co. v. Slattery*, 3 App. Cas. 1155. They having done so here, I see no reason for disturbing their finding.

As to the amount of damages. The accident was a serious one. When brought into the hospital plaintiff was in a dangerous condition, and for some days thereafter her life was in danger. . . . At the trial her eye was still slightly bulged out. Her attending physician says: "She must have come down with an awful bang." She remained in the hospital for 4 weeks, and had been under medical treatment intermittently up to the time of the trial, which was 7

months after the accident. She has not been in good health since, and her hearing in both ears is affected. Dr. Gardiner gave the opinion that it would not improve. He also considered that her sight had been permanently impaired.

During the argument of the appeal I formed the impression that her injuries were slight, and that the amount of damages awarded by the jury might possibly be considered as somewhat high, but, having since carefully read the medical evidence at the trial, I find that the injury was of the serious nature above described, and am of opinion that \$750 is a moderate verdict, and should not be disturbed.

The appeal should be dismissed with costs.

MABEE, J.

JUNE 21ST, 1906.

TRIAL.

HOBIN v. CITY OF OTTAWA.

Highway—Non-repair—Injury to Person—Loose Iron Lid of Catch Basin in Sidewalk—Absence of Defect in Construction, Negligence, or Notice—Municipal Corporation—Failure of Action against.

Action for damages for personal injuries sustained by plaintiff from a fall upon a highway in the city of Ottawa, owing, as alleged, to the negligence of defendants in not keeping the highway in repair.

A. E. Fripp, Ottawa, for plaintiff.

T. McVeity, Ottawa, for defendants.

MABEE, J.:—The plaintiff, an elderly lady, met with a painful accident on the corner of Bank and Gladstone streets, in the city of Ottawa, on 17th November, 1905, for which she claims damages from the corporation. Placed in the concrete walk on the street corner, at its outside edge, level with the surface of the walk, is an iron frame about 2 feet square, having in its centre a large round iron top or lid weighing some 40 or 50 pounds, held in place by its own weight; in the face of the frame is an iron grating extending down to the level of the street pavement from 6

to 8 inches, to enable the water to reach a drain or sewer from the gutters upon Gladstone and Bank streets, meeting at that corner. The concrete walk is not constructed with a square or right angled corner, but has a circular front, and the face of the iron frame is also circular, following the radius or curve of the walk. This iron structure, firmly built into the walk and covering part of it, forms a catch basin, the lid or top being movable, so that the city employees may clean out any refuse that may obtain access to the basin through the iron grating at the front.

It is impossible to remove this heavy top or lid without some iron tool inserted in a small hole at one side; it was said a pick axe was generally used. The whole of this iron structure is most solid and enduring; it is practically in the same condition now as when originally placed in position; it is apparently in no way worn, and no defect of any kind was shewn to exist in it, or the adjacent portions of the cement walk.

Plaintiff had left a Bank street car, and was waiting at this corner for a Gladstone car, and, stepping back to let some children pass, one foot and leg went down through this catch basin—the top or lid tipping or tilting as the plaintiff stepped upon the edge. She was seriously hurt, unable to get out alone, and was assisted from this position and taken to her home by some gentlemen who were passing at the time. Plaintiff had seen the iron surface of the catch basin before stepping upon it; she says she did not think it was raised up on either side; a young lady who was with her says that, as far as she could see, the cover or top was in place, or “on all right.” There was no snow on the walk.

The city engineer said there were a number of similar contrivances on the streets, which had been there prior to his taking the office some 7 years previously; that the top could be fastened or locked down, but that he did not regard it as necessary; and that the same kind of catch basins were used in other cities. The corporation foreman said the basins had not been cleaned out for two weeks prior to the accident. There was no evidence of any employee having been at work at the basin and omitting to put the top back in proper position, nor anything from which any such inference could be drawn. There was no notice of any kind to

the corporation, either express or implied, that the basin was out of order, or could become out of order, except that an employee might not place the top back in proper position. The engineer said a heavy dray or van turning the street corner might jar the top loose by hitting the outside or face of the frame, but there was no evidence that any such thing had ever happened at this or any other corner.

I do not think, in these circumstances, plaintiff can recover. There is no statutory non-repair, and the only ground upon which liability could exist would be original defective or negligent construction. I do not think there was negligence in the original construction simply because the top was not provided with some lock or bolt. An iron top of this weight might reasonably be expected to hold itself in position. A plan or system of carrying away the surface water from the pavements and walks is, in good faith, adopted, part of which is the use of this kind of basin . . .

Plaintiff then, to succeed, I think, must shew that there was negligence in the kind of catch basin selected, that it was necessarily dangerous, and in effect a trap for pedestrians to fall into. A remote possibility of an accident is not evidence of negligence. There is no evidence to shew how this top got out of place; it seems a mysterious and unaccountable accident, and the whole matter is left in conjecture. I do not think *res ipsa loquitur* applies.

If plaintiff is able to satisfy some other Court that she is entitled to hold defendants accountable for her misfortune, in order that the expense of another trial may be avoided I assess her damages at \$500, and would of course give her the costs of the action.

In the meantime I feel compelled to dismiss the action, but without costs.

Reference may be had to the following cases: *Thomas v. Annapolis*, 28 N. S. Reps. 551; *Cowley v. Newmarket Local Board*, [1892] A. C. at p. 349; *Geddes v. Bacon Reservoir*, 3 App. Cas. 455; *Bathurst v. MacPherson*, 4 App. Cas. 256; *White v. Hindley Local Board*, L. R. 10 Q. B. 219; *Rhineland v. Lockport*, 38 N. Y. St. Rep. 567; *Johnston v. City of Toronto*, 25 O. R. 312; *Carr v. Northern Liberties*, 35 Penn. 324.

JUNE 21ST, 1906.

DIVISIONAL COURT.

REX v. LAFORGE.

Municipal Corporations—By-law Fixing License Fees for Hawkers—Conviction—Motion to Quash—Attacking Validity of By-law—Prohibition under Guise of License—Finding of Magistrate—Review by Court—Objections to By-law upon Extrinsic Grounds—Repeal of Amending By-law—Effect of—Statute Authorizing By-law—Proviso—Negating—Amendment of Conviction—Costs.

Motion by defendant to quash his conviction under by-law No. 757, sec. 374, of the town of Berlin, as amended by by-law 821, for a violation of such by-law "by going from place to place with an animal bearing or drawing or otherwise carrying goods, wares, and merchandise for sale, without a license therefor."

W. Proudfoot, K.C., for defendant.

J. E. Jones, for the informant.

The judgment of the Court (MULOCK, C.J., ANGLIN, J., CLUTE, J.), was delivered by

ANGLIN, J.:—Upon the argument we held that the by-law conforms to sub-sec. 14 of sec. 583 of the Municipal Act, 1903; and we amended the conviction, in accordance with the evidence, by inserting before the word "going," the words "carrying on the trade of a hawker and." So amended, the conviction is, in our opinion, warranted by the terms of the by-law.

Defendant, however, impugns the validity of the by-law, upon the ground that, under the guise of licensing, it prohibits the exercise of the calling or trade of hawking or peddling in the municipality, and that it was in fact passed for this purpose at the instance of the retail merchants of the town, and not for regulating or licensing persons following these callings.

While there is much evidence to support these views—and such might be our conclusions, were we trying defendant, or hearing an appeal from the conviction, or considering

a motion to quash this by-law—the finding of the magistrate who made the conviction “that the license fee is not prohibitory in its nature,” based upon a consideration of the evidence, may not be impeached in this Court upon the ground that it is against the weight of evidence. Though it may be very slight, we cannot say that there is no evidence whatever to support a finding that the by-law is not prohibitive in character or effect, or that the magistrate was bound to hold the evidence before him sufficient to satisfy the burden, which lay upon defendant, of proving the by-law to be prohibitory.

But, in thus disposing of these objections to the validity of the by-law, we must not be understood to accede to the contention that it is open to a defendant, upon trial before a magistrate, or upon motion to quash a conviction, to attack the validity of the by-law under which he is prosecuted, on grounds such as these, not apparent upon the face of the by-law, and to be established, if at all, by extraneous evidence. Upon this question we find it unnecessary to express an opinion.

Defendant further objects that, although by-law No. 779 amended sec. 374 of by-law 757 by striking out the words “twenty, five, and four,” being the words stating the amounts of the several license fees imposed, and substituting therefor the words “seventy-five, fifty, and fifty,” respectively, by-law No. 821, which wholly repealed by-law 779, did not in terms restore to by-law 757 the words “twenty, five, and four,” but merely directed the substitution of the words “seventy-five, fifty, and fifty” for the words “twenty, five, and four,” respectively, as if those words were restored to the original by-law by the repeal of the amending by-law, which had removed them. In the absence of any legislation making applicable to by-laws the rule which, under sub-sec. 46 of sec. 8 of the Interpretation Act, restricts the effect of the repeal of repealing statutes, this contention cannot prevail: *Maxwell on Interpretation of Statutes*, 4th ed., p. 622.

The repeal of by-law 779 restored sec. 324 of by-law 757 to its original condition, and by-law 821 was therefore properly drawn, and effected the purpose for which it was intended.

The conviction does not, upon its face, negative the applicability of the proviso to sub-sec. 14 of sec. 582 of the Municipal Act, which exempts from the operation of that

sub-section a hawker selling to a retail dealer or selling goods manufactured in the province by himself or his employer. But the evidence sufficiently shews that defendant was not within this saving proviso, and we should, therefore, we think, yield to the request of counsel for the informant that the conviction be amended to meet this objection.

We cannot find that defendant has been, as he urged in his last objection, convicted of two separate and distinct offences. . . .

Motion dismissed. In view of the amendments required to support the conviction, there should be no costs of the motion.

MABEE, J.

JUNE 22ND, 1906.

TRIAL.

RIDEAU CLUB v. CITY OF OTTAWA.

Assessment and Taxes — "Business Assessment" — Club — Members' or Non-proprietary Club — Liability to Assessment—4 Edw. VII. ch. 23, sec. 10 (O.)

Action to obtain a declaration that a certain "business assessment" imposed upon plaintiffs was illegal and void.

Travers Lewis, Ottawa, for plaintiffs.

Taylor McVeity, Ottawa, for defendants.

MABEE, J.:—The Assessment Act, 4 Edw. VII. ch. 23, sec. 10 (O.), provides, among other matters, as follows: "Irrespective of any assessment of land under this Act, every person occupying or using land in the municipality for the purpose of any business mentioned or described in this section shall be assessed for a sum to be called "business assessment," to be computed by reference to the assessed value of the land so occupied or used by him as follows . . . (e) Every person carrying on the business of what is known as . . . a club, in which meals or spirituous or fermented liquors are sold or furnished . . . for a sum equal to 50 per cent. of the said assessed value."

The real estate of the Rideau Club is assessed at \$33,300, and, acting upon the foregoing section, the assessment officers of the city have assessed upon the club a further sum of \$16,650 for "business assessment," and from that assessment the club appealed to the Court of Revision, and, that appeal being dismissed, a further appeal was had to the County Court Judge, who, upon objection being taken by the defendants, held, upon the authority of *Toronto R. W. Co. v. City of Toronto*, [1904] A. C. 809, that he had no jurisdiction to determine the validity of the assessment.

The Rideau Club was incorporated by 29 Vict. ch. 98, which was amended by 52 Vict. ch. 99 (O.), and a further amendment was 59 Vict. ch. 122. By the original Act it is recited that a large number of persons therein named, together with others, have associated themselves for the establishment of a club "for social purposes." These and such other persons as should thereafter become members of the association were then declared to be a body politic and corporate in deed and in name, by the name of the Rideau Club, with power to purchase, acquire, hold, possess, etc., real estate, etc., for the purposes of the club. Provision was made for a constitution and rules regulating the affairs of the club. There is no capital stock; there being nothing to declare any dividends upon, none has ever been declared or paid; there was no intention from the formation of the club that there should be any division of earnings ever made. The secretary, the only witness called, says it is a social club, as distinguished from a proprietary club; that the members own and run it; no member has any proprietary interest that he can sell or assign; in the event of death nothing passes to his representatives; he has personal privileges only, which are regulated by the by-laws and rules in force from time to time; the membership is about 425, consisting of prominent business and professional men throughout Canada; it is maintained by entrance fees and annual subscriptions; meals and liquors are furnished to members and their guests; an annual loss is made in connection with the dining room; and the price charged for liquors is only intended to cover cost and breakages. The chief source of revenue for the up-keeping of the club is from the entrance and annual fees, which last year were about \$21,000, and about \$3,000 received by the club from tenants who have parts of the club property rented. . . .

I am of opinion that this assessment falls within sec. 10, and is a valid one.

There are several instances of incorporated clubs that have a capital stock upon which dividends might be earned or paid, and it was suggested that those are the clubs that are aimed at, where the stockholders are the proprietors, and there are individual rights and holdings. I do not see how this distinction can be made—the statute does not make it.

It was said that, to be taxable under this section, a club or its members must intend to make a profit or gain. . . . I do not think that this is necessarily so. The Standard Dictionary gives, among others, as the meaning of the word "business," an occupation that requires energy, time, and thought—any matter or affair, especially one requiring energy or diligence. Then synonyms are "affairs" or "concerns." Now, if the section read "every one who carries on the affairs of a club," I think it could not be argued that the case did not fall within the section in question; and to prevent the application of it, the word "business" must be held to mean something from which profit or gain is intended. I do not think this view is in conflict with *Smith v. Anderson*, 15 Ch. D. at p. 258, cited for plaintiffs.

This certainly is a members' club, as distinguished from a proprietary club, but, upon the wording of the section, why is one within it, and the other not? The English cases collected in *Wertheimer's Club Law*, 3rd ed., do not give much assistance.

In another view plaintiffs may be said to be "using land" for "carrying on the business of a club" for gain or profit, if the latter is necessary. They derive \$3,000 a year from rentals; this must be from real estate not actually in use for club purposes, and represents an accumulated profit from the operations of the club, or money borrowed upon debentures or mortgages, both of which the club has power to do. . . .

[Reference to the statutes affecting the plaintiffs.]

May there not be a large "gain" to the members? It need not be in the form of dividends, but may be from the enjoyment of the club premises, access to the library, and a large number of current magazines, papers, etc., getting meals, according to the evidence, at less than cost; all this, it seems to me, is the conduct of the affairs or concerns of this club by its members, through the committee, from which

they reap material advantages and profits. One may think of instances in which some organization in the nature of a club would or might not fall within this section, but this is of no assistance in determining the case in hand.

I think, in either view of the matter, the action fails and must be dismissed with costs.

TEETZEL, J.

JUNE 22ND, 1906.

TRIAL.

CARTWRIGHT v. CARTWRIGHT.

Life Insurance—Benefit of Wives and Children—Attempted Change of Beneficiary from Wife to Children—Application of Law Existing at Time of Attempt—Statute—Amendment Conferring Power to Change — Interference with Vested Right—Retroactivity—Estoppel.

Action for a declaration that certain insurance moneys paid into Court were the property of plaintiff and for payment thereof to plaintiff.

J. B. Clarke, K.C., and C. Swabey, for plaintiff.

C. A. Moss, for defendants.

TEETZEL, J.:—I think the rights of the parties must be determined by the state of the law on 16th December, 1886, the date when the assured attempted to change the beneficiary from his wife, the plaintiff, to his children, the defendants. *Mingeaud v. Packer*, 21 O. R. 267, followed by *Neilson v. Trusts Corporation of Ontario*, 24 O. R. 517, and *Re Harrison*, 31 O. R. 313, abundantly establishes that under the statute then in force (47 Vict. ch. 20) the first certificate became a trust in favour of plaintiff, and ceased, so long as she lived, to be under the control of her husband, except under the provisions of secs. 5 and 6 of that Act, which, however, did not authorize him to surrender the first certificate and replace it by the second. This could only be done with her consent, under 48 Vict. ch. 28, sec. 1, sub-sec. 3.

Mr. Moss argued with great ingenuity that the subsequent Act 59 Vict. ch. 45, sec. 2, now R. S. O. 1897 ch. 203,

sec. 160, which supersedes the effect of *Mingaud v. Packer*, is declaratory, and that the effect of sub-sec. 5 of sec. 160 is to validate the second certificate and declaration in favour of the children as against the wife.

I am unable to adopt this construction.

Sub-section 5 reads as follows: "This section shall apply not only to any future contract of insurance and to any declaration made on or relating to any such contract, but also to any contract heretofore issued and declaration heretofore made."

Before 59 Vict. ch. 45, there was not, without consent of the wife who had been named beneficiary, any power "wholly to divest" the right acquired by her.

I think the proper construction to be given to sub-sec. 5 is that the powers given by sub-secs. 1 and 2 of sec. 160 may be exercised with reference to any contract heretofore issued or declaration heretofore made, and not that any such contract or declaration shall be valid notwithstanding that at the time it was issued or made it was not in accordance with existing law.

The construction contended for would result in an interference with the vested interests of plaintiff, and, unless the language of the legislature is very explicit, no such construction should be adopted.

While the section in question is in part retrospective, one should not give a larger retrospective power to it than one can plainly see the legislature intended; and I confess I can see no intention to do more than confer the additional power on the assured which may be thereafter exercised with reference not only to future but to past contracts and declarations. The assured did not avail himself of this power, and plaintiff's rights under the first policy have not been divested.

Plaintiff is not, in my opinion, estopped either by the agreement of separation or the invalid divorce. . . .

Judgment for plaintiff without costs.

JUNE 21ST, 1906.

DIVISIONAL COURT.

COLLINS v. BOBIER.

*Contract—Division of Estate—Release—Action to Set aside—
Delay—Statute of Limitations—Misrepresentations—Un-
due Influence—Improvvidence—Failure of Proof.*

Appeal by plaintiff from judgment of BOYD, C., dismissing without costs an action brought by William H. Collins against his sister, Mary Bobier, to set aside, as improvident and procured by undue influence, an agreement between them with respect to the division of their deceased father's estate and a certain release, and for other relief.

The appeal was heard by MULOCK, C.J., ANGLIN, J., CLUTE, J.

R. T. Harding, St. Mary's, for plaintiff.

A. Shaw, K.C., for defendant.

CLUTE, J.:—By will dated 23rd February, 1884, the testator gave the residue of his estate, real and personal, not reserved for the payment of debts, to his son William H. Collins, the plaintiff, and his daughter Mary Collins (now Mary Bobier), the defendant, to be equally divided between them. By codicil dated 13th October, 1884, the testator gave and bequeathed to another daughter, Matilda Draper, "the use during her lifetime of the brick cottage and grounds as now used and occupied by her, being part of lot 298 C. C. Town of Stratford."

The testator died on 24th December, 1887.

Probate was granted to the executors, James Wright and George Hunter, on 23rd January, 1888.

The value of the personalty was proven by the executors in the Surrogate Court at \$3,305.75, and the real estate at \$3,746, making a total of \$7,051.75.

On 20th February, 1888, the real estate was divided between the plaintiff and defendant, and mutual conveyances were executed on that date, in which the executors joined. The deeds contained the recital that plaintiff "had agreed

to take as a part of his share of the estate" the parcel therein described at \$1,500, and that defendant "has agreed to take as part of her share of the said estate" the parcels therein described at \$1,500 and \$500.

On 1st October, 1891, plaintiff and defendant executed a deed of release to the executors, which recites that, "whereas the parties of the first part some time ago agreed upon a division of the said estate, and certain conveyances were executed for the purpose of partly effectuating the intention of the said parties of the first part in that regard," and, after releasing the executors from all claims, contains the following: "And the said parties of the first part do hereby declare that they have respectively received the shares of the estate of the said Mark Collins which they are entitled to under and by virtue of the said will, and that the division of the said estate which they mutually agreed to between themselves is satisfactory to them."

In pursuance of the said release the executors conveyed to plaintiff and defendant the property on Wellington street, subject to the interest of Mary Draper as mentioned in the will.

On 24th July, 1894, plaintiff and defendant entered into a certain agreement under seal, which recites that they have settled and arranged all matters between them and the executors of the estate of their said late father, except certain personal property and securities in which they have a joint interest, and a certain piece of land described in a certain deed from said executors to them bearing date 29th June, 1892, and have arranged that the party of the second part retain all the personal property now held by them and pay to plaintiff \$550 as follows, \$150 on the date of the agreement and \$100 a year without interest, the first of such payments of \$100 to be made on 24th July, 1895." And the plaintiff, in consideration thereof, assigns said personal property to defendant, "thus leaving open between them, not separated into parts, said city lot only."

The plaintiff now asks the Court to declare that the release of 1st October, 1891, and the agreement of 4th July, 1894, are not binding upon the plaintiff and for administration of the estate, and for an injunction.

The ground upon which this relief is sought is that both the release and the agreement were procured by misrepresentation, undue influence, and untrue statements in refer-

ence to the will, and also on account of undue influence that the defendant exercised over the plaintiff, who, it is alleged, "is a man of weak intelligence and unable to manage his own affairs," and on the ground of improvidence and lack of independent advice.

The Chancellor finds that there has been no proof of any misrepresentation or untrue statements with reference to the will, or release; and the evidence, I think, fully supports this finding.

Plaintiff called three witnesses, viz., George Hunter, one of the executors, the plaintiff, and James Sherman, the assessor.

Hunter says there were three parcels of real estate, valued at \$3,746. The homestead was valued at \$1,500, and he does not remember the value placed on the other two. The probate papers were taken out by Mr. Smith to the satisfaction of both parties. After probate was granted it was agreed between the two that Mary Collins, the defendant, who had done her father's business, would look after the estate business and take all moneys. The executors handled no moneys of the estate. He does not remember the particulars of the deed of 28th February, 1888, and has no recollection of any division of the estate by the executors, and states that no complaint was ever made "about the way things had been done." "When we drew up the valuation and the moneys that was in the estate and how it had to be divided, they were perfectly satisfied there."

Plaintiff says defendant had the whole control of the business. He does not remember what amount he received altogether. He says he signed the release because his sister asked him to; that he had confidence in her; and that he signed the other deeds in the same way; that he has forgotten all about the different transactions. From first to last there is not one word in his evidence that would lead one to think there was misrepresentation or undue influence practised upon him.

James Sherman, assessor for 1888, is the only other witness called for plaintiff, and from the assessor's roll it appears that in that year the homestead was assessed at \$1,600, and the Draper property, on which was the blacksmith shop, at \$1,700, which was reduced by the Court of Revision of that year to \$1,375. The part on which is the blacksmith shop is placed at \$750.

Portions of defendant's examination were also put in by plaintiff. From this it appears that the solicitor who acted for the estate was engaged by defendant and plaintiff apparently on the suggestion of the doctor. The brother and sister lived on the homestead from December, 1887, until 1891. She says plaintiff wished to take the property on Wellington street, and for her to take the homestead, and it was decided by the executors and divided in that way. The executors had nothing further to do with the estate after the release was given. She says her brother agreed to the release, which was prepared by Mr. Shaw and signed in the presence of Dr. Devlin, and there was never any friction between them.

This closed plaintiff's case, and I can find no proof whatever of any misrepresentation or undue influence. The solicitor who prepared the deeds and release and the doctor who witnessed the final agreement were not called, and, in my opinion, it being a family settlement, plaintiff entirely failed to make out his case, had it stopped here.

For the defence, however, both the solicitor and the doctor were called. I will shortly refer to the defendant's evidence. She explains that the solicitor, Mr. Smith, was the son of Dr. Smith, the family doctor, and that is how he happened to be retained as solicitor for the estate.

The parties with the executors and Mr. Smith made the valuations put upon the property, and there was a partial division of the real estate according to these valuations, the brother preferring to take the corner lot. The result of this division would be that, according to the valuations put upon the lots as appears in the deeds, she would have an advantage of half the value of the Scanlan lot, viz., \$250.

There was a loss on bad loans of \$900. The loans were made, she says, with plaintiff's knowledge and consent, to relatives, to get a higher rate of interest. She says the matter was talked over between herself and brother, and he thought the settlement by which she was to receive \$550 very satisfactory, and so the final settlement of 1894 was made. They had lived together for 4 years and a half after the father's death, and all the money of the estate had been used up, except the \$150 which was paid to defendant at the time of settlement. She says she paid the expenses of the housekeeping, and paid for his clothes, etc., out of the estate moneys, the two living together.

Mr. Smith is called by defendant, and says he was the solicitor for the executors. He never knew defendant before. He does not recollect distinctly about the transaction of 1888 when the real estate was partly divided. His recollection is that the parties had agreed among themselves as to the division. "Q. Have you any doubt that at that time William Collins understood what he was doing? A. Well, I never allowed him to sign a document if I did not think he did. I certainly would not, and certainly when I knew him in my early days he was a man who would understand what he was doing."

"Q. And would understand the business? A. Oh, I would say so.

"Q. You had no doubt of it? A. No, I would not have let him sign the deed if I thought there was any doubt about it."

He says with reference to the release that, plaintiff being about to marry, the executors and he thought it right that there should be a division, and the parties came together, and the release was signed, but the further division of the estate was not made at the time, as neither the plaintiff nor the defendant thought it necessary.

Dr. Devlin, who has known the parties for the last 15 years, was called by defendant. He witnessed the agreement of 1894. He says they talked over matters between themselves, and came to a settlement, and that he "was impressed that William thoroughly understood it." He thinks a detailed statement of the estate was given at the time the bad loans were spoken of.—"They were both willing at the time it was lent, but the circumstances of it I could not give. I know they talked that over." "It was read and explained, to the best of my knowledge, read a couple of times."

All the witnesses say that after this length of time they remember very little about the different transactions material to the case.

There is nothing in the evidence from first to last that I can find shewing misrepresentation of any kind. During the time the parties lived together, the greater part of the personality was spent or lost.

No evidence was given by plaintiff as to his mental condition, and he is put forward as a witness in his own behalf. His answers are intelligent, and afford no evidence, to my mind, that he did not understand what he was doing.

It is now sought to disturb this family settlement, when, from the nature of the case, it is impossible to say what are the real facts of the case, and 11 years after the settlement was made in the presence of a doctor who heard their affairs all talked over and agreed to, and who says he was impressed with the fact that plaintiff thoroughly understood it.

Plaintiff's counsel relied on *Waters v. Donnelly*, 9 O. R. 391; *Sheard v. Laird*, 15 O. R. 533; *Disher v. Clarris*, 25 O. R. 493. I do not think any of these cases apply here.

I do not see any ground for intervening at this date to disturb what was done by the consent of all parties in the valuation put upon the lands.

Taking the personalty at \$3,307, and deducting for bad loans \$900, it leaves \$2,407; out of this were paid the funeral and testamentary expenses . . . amounting to about \$200—leaving \$2,200. I think it quite probable that a very considerable portion of this money was expended in household expenses during the time plaintiff and defendant lived together. It was a common household, continued from the death of the father, and I have no doubt this arrangement was made to the entire satisfaction of plaintiff.

Defendant may have received more than her share of the estate — probably she did have some advantage — but without proof of fraud or undue influence I do not see how at this late date plaintiff can succeed. The parties most likely to have a knowledge of the transactions were called by the defendant, and, while they all say that they remember very little about it, they declare that plaintiff seemed to understand what he was doing and was satisfied with the disposition of the estate that was made.

After more than 10 years it is sought to undo all this.

When the personal estate was collected by defendant it was money had and received by defendant for plaintiff, and 6 years in respect of that would be a bar: *Kirkpatrick v. Stevenson*, 3 O. R. 361.

I think the judgment of the Chancellor is right and ought to be affirmed.

ANGLIN, J., gave reasons in writing for the same conclusion.

MULOCK, C.J., also concurred.

Appeal dismissed without costs.

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TEETZEL, J.

JUNE 22ND, 1906.

CHAMBERS.

RE HENDERSON AND CANADIAN ORDER OF ODD-
FELLOWS.

Life Insurance—Wife of Assured Designated as Sole Beneficiary—Death of Wife during Lifetime of Assured—Failure to Make New Designation—Children Entitled in Equal Shares.

Application by the adult children of one Henderson, deceased, for payment out of Court of their shares of a sum paid into Court by the above named Order, being the proceeds of an insurance on the life of the deceased.

W. E. Middleton, for the applicants.

F. W. Harcourt, for the infant children.

S. G. McKay, Woodstock, for Mrs. Beaumont.

TEETZEL, J.:—The wife of the assured having been designated by him sole beneficiary, and having died during his lifetime, and he not having made any further declaration respecting the benefits under the policy, the children of the assured are entitled to the money in equal shares, under sub-sec. 8 of sec. 159 of R. S. O. ch. 203, as enacted by sec. 7 of 4 Edw. VII. ch. 15. The contention that this section does not apply where there was only one beneficiary originally named, who dies in the lifetime of the assured, cannot be upheld. While the affidavit of Mrs. Beaumont does not disclose any agreement binding upon the adult children for a

division of the insurance, the order will direct payment to the children without prejudice to any action she may be advised to bring either against the adults or the estate. No order as to costs, except those of the adult children and of the official guardian be paid out of the moneys in Court.

CARTWRIGHT, MASTER.

JUNE 25TH, 1906.

CHAMBERS.

TRAVISS v. HALES.

(TWO ACTIONS.)

Judgment Debtor—Examination of—Costs of—Examination of Transferee—Disposition of Costs.

Motion by plaintiff for an order disposing of the costs of the examination of one of the defendants in the first action as a judgment debtor and of the examination of a transferee who was made defendant in the second action.

J. W. McCullough, for motion.

James Hales, contra.

THE MASTER:—These examinations resulted in the bringing of the second action, in which the impeached transfer was set aside.

It seems reasonable that these costs should be recoverable against defendants in the first action and against the land.

If it was sought to have them made costs in the second action so as to render the transferee personally liable, I think the application should have been made to the trial Judge. See *Tucker v. The "Tecumseh,"* 7 O. W. R. 377.

As the costs of the second action were fixed by the trial Judge at \$40, and plaintiffs' appeal as to this has been dismissed by the Divisional Court, I do not see that I have any power to increase them.

The order will therefore be that the costs of the examination be recoverable against the defendants in the first action, which will bind the land in question.

There will be no costs of the motion, as it has been only in part successful.

CARTWRIGHT, MASTER.

JUNE 25TH, 1906.

CHAMBERS.

SERVOS v. LYNDE.

Venue — Motion to Change — County Court Action — Convenience—Witnesses—Counterclaim.

Motion by defendant to transfer the action from the County Court of Lincoln to that of Ontario.

J. W. McCullough, for defendant.

H. E. Rose, for plaintiffs.

THE MASTER:—The action is to recover the value of a quantity of hay which was in a barn leased by defendant from plaintiffs' testatrix.

The defences are: (1) that the hay was worthless; (2) that the testatrix gave it to defendant to use for manure on the farm which was leased by her to him. The defendant also counterclaims for damages for breach of covenants in the lease and asks \$600.

Assuming that the affidavits are true, then it appears that the plaintiffs will have 8 witnesses, including two of the three executors. The third plaintiff resides in Ontario, but desires the action to be tried in Lincoln, where all the business of the deceased has been conducted.

The defendant must himself be at the trial. He also says he intends to call 10 or 12 witnesses as to the value of the hay.

Assuming that this is necessary or permissible, it would only leave a balance of 2 or 3 witnesses in favour of the motion. This, under the cases, is not a sufficient preponderance to justify the removal of the action from the county where the plaintiffs have brought it reasonably and not vexatiously.

Except in a case such as *Farmer v. Kuntz*, 7 O. W. R. 829, the fact of a counterclaim is not to be considered.

The motion fails and is dismissed with costs in the cause.

The case of *Saskatchewan Land and Homestead Co. v. Leadley*, 9 O. L. R. 556, 5 O. W. R. 449, cited for the motion, does not seem in point. . . .

[Affirmed by CLUTE, J., 29th June, 1906.]

ANGLIN, J.

JUNE 25TH, 1906.

TRIAL.

FLYNN v. KELLY, DOUGLAS, & CO.

Sale of Goods—Action for Price—Refusal to Accept—Contract—Telegraph—Agency of Telegraph Company—Mistake in Transmission—Evidence—Destruction of Original Dispatch—Secondary Evidence of Contents—Burden of Proof—Failure to Prove Contract—Non-delivery of Part of Goods Ordered—Delay in Shipment.

The plaintiffs, fruit canners of St. Catharines, sued the defendants, merchants of Vancouver, B.C., for the price of a car of canned fruits and vegetables shipped to Vancouver in September, 1905, which the defendants refused to accept.

M. Brennan, St. Catharines, for plaintiffs.

A. C. McMaster, for defendants.

ANGLIN, J.:—In August, 1905, plaintiffs wrote to defendants a letter quoting prices of various canned goods, including beans, pears, plums, and cherries. Satisfactory proof of the loss of this letter was given, and secondary evidence of its contents received. It concluded with a request or suggestion that defendants should order by wire at the expense of plaintiffs. Defendants' witnesses, examined on commission, though they do not pretend to give the language of the letter, say it contained a distinct request to order by wire at the expense of plaintiffs. The evidence of the only witness called for plaintiffs is not at all clear that the passage in question fell short of a request and amounted merely to a suggestion that defendants should order by telegraph, and he admits that the plaintiffs offered to pay the charges of the telegraph company for any such message sent by the defendants. No copy of this letter appears to have been kept by the plaintiffs. Upon this evidence I should be obliged to hold, if necessary, that plaintiffs did request defendants to telegraph at their expense.

On 29th August plaintiffs received from the Canadian Pacific Railway Company the following despatch, upon which they paid the charges: "Vancouver, B.C., Aug. 29,

1905.—Flynn Bros., St. Catharines. Hundred refuge beans two fifty gallon pears three hundred tomatoes three fifty lombard plums twenty-five red pitted cherries must ship immediately wire car number Canadian Pacific. Kelly, Douglas, & Co.”

On 30th August plaintiffs sent in reply this message: “Aug. 30.—Kelly, Douglas, & Co., Vancouver, B.C. Have booked your order, will have same rushed forward. Flynn Bros.”

On 1st September plaintiffs received the following despatch: “Vancouver, B.C., Sept. 1st, 1905. To Flynn Bros. Goods must be shipped at once or cancel, advise Canadian Pacific car number, rush. Kelly, Douglas, & Co.”

On 5th September plaintiffs shipped 300 cases of tomatoes, 350 cases of plums, 100 cases of refuge beans, and 25 cases of red pitted cherries, and mailed an invoice for this “car-load” to defendants. On receiving this invoice on 13th September defendants telegraphed: “Vancouver, B.C., Sept. 13, 1905—Flynn Bros., St. Catharines, Ont. Cannot accept goods, only ordered fifty plums, wanted pears, you dispose elsewhere.”

On the same date defendants wrote explaining that their order had been for 50 cases of plums, and that they could not take any of the fruit because the pears ordered had not been sent. To this plaintiffs did not reply. The car reached Vancouver on 23rd September. On 2nd October defendants wrote plaintiffs confirming their telegram and letter of 13th September and informing plaintiffs that the car lay awaiting their disposition. On 7th October plaintiffs telegraphed defendants: “Goods shipped strictly according to order received; pears are ready to ship; you must accept goods; have written.” Defendants answered this message on 9th October, reiterating their refusal to accept. On 17th October they again wrote declining to accept and informing plaintiffs they would resist any attempt to hold them liable for the car of fruit.

The pears were in fact never shipped. Plaintiffs, in excuse for non-shipment of this part of the order, say that the balance of the order filled a car, and that the custom of the trade, their course of business with defendants, and the tenor of the telegraphic orders on which they acted, required shipments to be in car-loads, and justified their withholding

the pears for a reasonable time until another car-load for Vancouver should be ready for shipment. They add that, owing to difficulties in the printing trade, they could not get labels for canned pears, and therefore could not ship them. They do not appear to have been ready to ship the pears until about 7th October, before which time defendants had definitely refused to accept any of the goods.

Defendants maintain that there was no contract because of a mistake of the telegraph company in transmitting their order, by which the words, "three hundred tomatoes three fifty lombard plums," in the despatch handed by them to the Canadian Pacific Railway Company were converted, in the transcript delivered by that company to plaintiffs, into "three hundred tomatoes three fifty lombard plums," resulting in their being sent seven times the quantity of plums they intended to order. They also maintain that the failure to deliver the pears ordered entitled them to reject the rest of the goods shipped.

Plaintiffs, on the other hand, contend that the Canadian Pacific Railway Company were agents of defendants in transmitting the message of 29th August; that, as against defendants, therefore, plaintiffs were and are entitled to treat the transcript delivered to them, and admitted in evidence without objection, as the order of plaintiffs; that there is no admissible evidence to prove any other order or any mistake in the transmission of the telegram, because the original despatch delivered by defendants to the Canadian Pacific Railway Company in Vancouver has not been produced, and, its loss or destruction not being proved, the secondary evidence of its contents taken on commission is inadmissible; that plaintiffs' acceptance of the order contained in the despatch as delivered to them constituted a binding contract; and that the non-delivery of the pears with the rest of the order did not, in the circumstances, justify defendants' refusal to accept the carload shipped to them.

The burden of proving a contract and performance of their part of that contract rests upon plaintiffs. If, as is contended by defendants, because of the request of plaintiffs that defendants should order by wire and at plaintiffs' expense, the Canadian Pacific Railway Company in transmitting the message of 29th August were in reality the agents of plaintiffs, there would be little, if any, weight in the contention that defendants were bound by the incorrectly trans-

mitted message which plaintiffs received. The error of the Canadian Pacific Railway Company would, in that aspect of the case, be the error of plaintiffs' own agents, the delivery of the order to plaintiffs being at Vancouver, when it was handed to their agents for transmission. But if there were no such request by plaintiffs sufficient to constitute the Canadian Pacific Railway Company their agents in the transmission of defendants' order, although some American Courts—see *Durkee v. Vermont Central R. R. Co.*, 29 Vt. 129; *Morgan v. The People*, 59 Ill. 58; and *Scott & Jarnagin's Law of Telegraphs*, secs. 351, 360; but see also *Smith v. Easton*, 54 Md. 139, and *Pepper v. Western Union*, 87 Tenn. 554—hold that, because the telegraph company is the agent of the sender, defendants would be bound by the erroneous copy of their despatch delivered to plaintiffs, and that the copy so delivered should be deemed the original order of defendants. English and Canadian decisions binding upon me do not countenance this view. . . .

[Reference to *Henkel v. Pape*, L. R. 6 Ex. 71.]

Assuming the mistake, which defendants in the present case allege, to be proved by proper evidence, I can see no ground upon which this case can be distinguished from *Henkel v. Pape*. That the telegram was in that case transmitted by the post office cannot make any difference in principle. The authority for the transmission and delivery of the message is in each case the same, and that authority the Court, in *Henkel v. Pape*, held to be limited to the transmission of messages in the terms in which senders deliver them. It follows that not the copy delivered to the recipient of the message, but the document handed to the telegraph company for transmission, is the original order which must be proven to establish the contract.

In *Kinghorn v. Montreal Telegraph Co.*, 18 U. C. R. 60, the Court held that when a contract is attempted to be made out through the telegraph, the messages signed by the parties must be produced and not the transcripts taken from the wire. See also *Verdin v. Robertson*, 10 Ct. of Sess. Cas., 3rd series, 35.

But it is argued by Mr. Brennan that because the transcript handed to plaintiffs was put in evidence at the trial without objection, and because defendants have failed to prove by any admissible evidence the contents of the message

delivered by them to the Canadian Pacific Railway Company for transmission, there is no proof that there was any error in the transcript, and its sufficiency as evidence of the offer of defendants is not open to question.

Defendants, instead of proving as a fact the destruction of the message delivered by them to the Canadian Pacific Railway Company for transmission on 29th August, relied upon some presumption, which they conceived arose from a supposed statutory provision permitting the destruction by telegraph companies of such messages after the expiration of 6 months from their delivery for despatch, to establish such destruction for the purpose of rendering admissible secondary evidence of the contents of the message in question. I find no such statute. But neither upon a permissive statute nor upon any custom, if proven, could there arise such a presumption. The fact of destruction must be shewn. It follows that the secondary evidence of the contents of the message delivered by defendants to the Canadian Pacific Railway Company was inadmissible, and, as it was objected to on behalf of plaintiffs, it must be rejected. There is, therefore, no evidence to shew what the order was of which defendants actually directed the transmission, and no evidence that the transcript delivered by the Canadian Pacific Railway Company to plaintiffs was incorrect.

But the burden of proving the contract is upon plaintiffs. It is not for defendants to prove that the transcript produced by the plaintiffs is not a true copy of the order which defendants handed to the Canadian Pacific Railway Company. Plaintiffs must prove its accuracy, which is not presumed in their favour. Neither does the admission of that transcript in evidence without objection render its terms binding upon defendants. It was not and could not be evidence of the order given by defendants, without proof that it was in fact a copy of the order which they had directed to be transmitted, and that the original, of which it purported to be a transcript, had been destroyed or lost. Its production was in any event a link in the chain of evidence requisite to prove that the order handed by defendants to the telegraph company had in fact been transmitted and delivered to plaintiffs. For that purpose it was relevant and admissible primary evidence, and its reception could not have been successfully resisted by defendants. But it by no means follows that its admission in evidence excused plaintiffs from

further proof of the order of defendants, by production of the original signed by them, or by proof of its destruction or loss and secondary evidence of its contents, which, without proof that it was in fact a true copy, the transcript delivered to plaintiffs does not furnish. In the absence of these further and indispensable links in the chain, the fact proved by the production of the transcript, viz., that such transcript was received by plaintiffs, goes for nothing. Yet neither its relevancy nor its admissibility can be doubted.

It follows that plaintiffs have failed to prove any contract by defendants to purchase the goods in question.

Moreover, though secondary evidence was given of a portion of the contents of plaintiffs' letter, quoting prices to defendants, upon which the latter sent an order, plaintiffs have wholly omitted to prove what were the prices so quoted. In their pleadings they allege that the price of the goods shipped amounted to \$1,382.50. But this, as well as other allegations, defendants deny. Were this the only difficulty in plaintiffs' way, I should probably allow them to supply evidence of the prices actually quoted. But upon the evidence as it now stands there is no proof whatever of the prices quoted by plaintiffs to defendants upon which they are alleged to have ordered the goods in question. This very material element of a contract is entirely lacking.

If there had been a contract between plaintiffs and defendants established for the sale and purchase of the goods mentioned in the transcript of telegram received by plaintiffs, the non-delivery of the 250 cases of pears ordered would, in my opinion, have justified defendants' rejection of the other goods sent. Instalment delivery was not contemplated. Immediate shipment of the whole was the basis of defendants' offer, emphasized by their second telegram of 1st September. The failure to send the pears with the other goods was not, I think, excused by the alleged custom as to carloads, and certainly not by any inability to procure labels. Plaintiffs had no right to require defendants to accept delivery of part only of what was an entire order. But even if, owing to the carload being complete without the pears, some little delay in forwarding these might be permitted, the delay from 29th August to about 7th October was so unreasonable that it might have justified defendants in returning the other goods, had they taken delivery of them in anticipation of the pears coming within a reasonable time.

The action therefore fails and will be dismissed with costs.

TEETZEL, J.

JUNE 25TH, 1906.

TRIAL.

FAULKNER v. CITY OF OTTAWA.

Municipal Corporation—Sewer—Insufficiency—Backing up Water into Cellar of House—Liability of Corporation.

Action for damages to plaintiff's stock in trade and premises by flooding, caused, as he alleged, by an insufficient sewer.

G. F. Henderson, Ottawa, for plaintiff.

Taylor McVeity, Ottawa, for defendants.

TEETZEL, J.:—I find upon the evidence that while the sewer, as originally constructed past plaintiff's premises on Clarence street, between King and Dalhousie streets, was probably sufficient for the territory then intended to be served thereby, yet the subsequent extension to Sussex street and the addition of many subsidiary drains leading into it have completely overtaxed its capacity, so that when there is a very heavy rainfall the contents of the sewer back up into adjoining cellars. The extension and subsidiary drains referred to were constructed by or under the direction of defendants.

According to the weight of expert opinion, the capacity of the original sewer and its outlet is not more than two-thirds of what it should be to accommodate the increased burden imposed by the acts of defendants. Having regard to the size and grade of the original sewer and the service already imposed upon it, I think defendants have acted negligently in so increasing the facilities for running into it storm water and sewage as to cause backing up and flooding during heavy rain storms, and that, in consequence of such negligence, plaintiff's basement was flooded and his goods damaged on the 3 occasions complained of. While the rainfall on these occasions was unusually heavy, none of the storms was so extraordinary as not to have been

reasonably anticipated and with ordinary prudence provided for by defendants.

I think the case comes within such authorities as *Coghlan v. City of Ottawa*, 1 A. R. 54, and *Hawthorn v. Kanulink*, [1906] A. C. 105.

I assess plaintiff's damages at \$1,700, and direct judgment in his favour for that sum with costs.

BOYD, C.

JUNE 25TH, 1906.

TRIAL.

ATTORNEY-GENERAL FOR ONTARIO v. HARGRAVE.

Crown—Mining Leases—Action by Attorney-General to Cancel—Improvidence—Misrepresentations—Affidavit as to Discovery—Untruth of—Evidence—Land Titles Act—Costs—Compensation for Improvements—Notice.

Action for the cancellation of certain mining leases and to recover possession of the lands comprised therein.

C. H. Ritchie, K.C., and R. D. Moorehead, for plaintiff.

E. F. B. Johnston, K.C., for defendant E. C. Hargrave.

J. Shilton, for defendants the White Silver Co.

BOYD, C.:—This action brought . . . (in the public interest) . . . took 10 days to try, with the result that a great mass of material, documentary and oral, has been gathered—much of which abounds in contradictions, inconsistencies, and singular contrasts of recollection, yet upon the essential issue the evidence is sufficiently clear and explicit.

That single point, upon which everything else turns, so far as the jurisdiction of the Court is concerned, appears to be this: Is the affidavit as to discovery upon which the claim rests, and upon which the Crown proceeded, a true or an untrue document? No one can give primary evidence as to the actuality of the discovery of valuable minerals on the particular locations except the man who claims to have

made the discoveries, for he was alone on the field without companion or witness, or existing memorandum made at the time. Yet his own admissions are practically conclusive that to support his claim he must shift the time of discovery to an earlier period by at least one month. The affidavit on which the claim is based fixes the date as 19th December, 1904, as to the three lots now in question. But his own evidence shows that he was at none of the lots in December, 1904, save only one; that is, being somewhere opposite lot 3 in the 4th concession, and casting his eyes over the snow, he saw upon the face of a rock some "cobalt bloom." This, however, is not the mineral which he claims to have discovered on that day on that lot in his affidavit; his sworn claim is for "cobalt arsenide." Now these two are of marked difference in colour, appearance, formation, and quality. "Cobalt arsenide" is otherwise known as "smaltite," and "cobalt bloom" or arsenate has a scientific name "erythrite" to mark its distinctive hue. One of the strongest witnesses for the defendants (Grover) doubts if the cobalt bloom could be seen in this locality in the month of December.

Besides this, serious doubt is cast upon Hanes being at this particular spot on that day, by the contrast between the evidence of Mr. Blair (whose recollection was fortified by a contemporaneous official diary) and the varied discoveries claimed by and on behalf of Hanes about this time. To exemplify: Blair states that Hanes came from Toronto to see him at New Liskeard on Friday evening 16th December. Blair occupied all the next day, Saturday 17th December, in taking Hanes round to visit the various mines then being worked in the Cobalt region, introducing him at different places, and collecting samples of ore to be given by Hanes to Professor Bain on his return. They parted at 10 p.m., Hanes saying that he was going home next day on a train which was to leave on Sunday. According to the affidavits filed—which supply the only definite information adduced emanating from the discoverers—to Hanes are attributed mineral discoveries on the 16th, 17th, 19th, and 20th December, at spots very remote from the Blair itinerary.

Again, and apart altogether from this, is the distinct statement by Hanes that all his discoveries were made some time in November, 1904. It was in that month that he walked down the transit line between sections, discovered

valuable minerals on either side his path, measured, by pacing from the survey posts, the exact location of his "finds;" was certain by inspection and from his scientific knowledge concerning their intrinsic value; could and might have made formal claim in November, inasmuch as nothing appears to be lacking on his own evidence to give him at that time the status and privileges of the first discoverer. He was familiar with the provisions of the Mining Act; knowing it was not necessary under the then existing law that the claim should be staked, he took the risk of criticism or of skepticism by abstaining from the obvious precaution of putting some mark on the ground to indicate his "finds."

As a competent person who was just finishing his fourth year in the School of Practical Science, and had completed his apprenticeship as a provincial land surveyor, it is impossible to disregard his statement that each item of discovery on the many locations was then made and was then complete. The excuses put forward rather by way of suggestion than explicitly that he waited to make an assay and that he returned next month (after the assay had certified values which he had before approximated) to see if there was any adverse claim or occupation, and that the discoveries are not to be accounted complete until all these factors concurred—these excuses are not relevant to postpone the date of the alleged actual discoveries.

Some stress has been laid upon the looseness of practice in the lands office prior to the creation of this district into a mining subdivision in April, 1905. It may be assumed that had application been made merely for 2 or 3 forty-acre lots before stricter regulations were imposed, these applications, accompanied by the usual affidavit, would have gone through the department unquestioned and almost as a matter of course. But early in the year 1905 the attention of the department was drawn to various circumstances by different persons (Professor Miller, among others, whose report first brought the district into notice in its mineralogical aspect), casting suspicion upon the genuineness of the Hanes explorations. Seventeen applications were sent in to the department based upon discoveries claimed to be made by Hanes (the son) ranging from 16th to 20th December, 1904; and, in addition, a smaller cluster claimed to be made by Hanes (the father) almost contemporaneously. It was further pointed out that the ground was covered with snow in that

part of the month, which would either prohibit or not permit of such rapidity in successful prospecting. This unusual combination of circumstances certainly raised doubts in the department—led to inquiries being made . . . led to requests or demands that the alleged discoveries should be verified in situ. This course of inquiry and investigation was cut short by the issue of the patents or mining leases under the direction of one of the subordinate officers in the Crown lands department, but without the direction or sanction of the Commissioner. The attention of the applicants claiming by virtue of the Hanes discoveries was drawn to the number of applications by letter in January, 1905 (16th January). Hanes himself admits that he thought there would be a row growing out of so many applications being put forward on discoveries made in so short a time. Yet when he received a letter from the Deputy Commissioner Gibson, dated 13th May, 1905, and received a day or two later, calling on him to make good his discoveries on the ground, he returned no answer. And being seen a fortnight or so after by Mr. Gibson, and the matter being again pressed upon him, he declined the undertaking and remarked that he did not know if he could go to the places again or not.

About contemporaneously with this came the interview with the then Commissioner of Crown Lands (Mr. Foy), who invited Hanes to explain how so many discoveries could be made in so short a period with the snow on the ground. But Hanes acted the reticent part—talked round the question and vouchsafed no explanation. So was the difficulty left unsolved, and the Commissioner said that upon and after that interview he would not have sanctioned the issue of the patents. (The Crown leases were dated 4th May and recorded 23rd May. Mr. Foy became Attorney-General on 31st May, and upon learning what had been done, he telegraphed warning to the Master of Titles at North Bay on 31st May, and caused the caution to be registered 8th June, 1905.)

Mr. George Hanes admits in his evidence that the snow was half way up to his knees when he was in Cobalt in December, 1904, but as to November he can give no date when he made any particular discovery.

(It may be noted parenthetically that Mr. Hanes (the father), being likewise called upon by the department to point out his alleged discoveries on the particular locations, made the attempt but failed therein, according to the report

of the government officer who accompanied him. This was spoken of in the interview between Mr. Gibson and Hanes (the son) towards the end of May, 1905.)

The reasonable desire for explanation and investigation on the part of the Crown, which was frustrated by the inertia of Hanes and the improvident issue of the mining leases, is now in effect being prosecuted before the Court, to such an extent at least as will remove any obstacle to the free and just action of the Crown, in case it appears that the present leases should not stand as valid concessions to the present holders.

It is argued that an honest or unwilling mistake in dates should not prejudice one who is in fact the first discoverer. Good reason may exist for recognizing his claim to priority, though it be presented in a mistaken manner. I am not persuaded that this argument should weigh with the Court, though it may be proper to urge before the Commissioner while yet the land is under his control or has been restored to his control. It is the practice of the Crown to issue patents to rightful claimants; the Crown may also ask the Court to investigate and determine who is the rightful claimant; but this litigation is solely to vacate the patents because wrongly granted. The department or the Commissioner will then, if the grant is declared void, proceed to deal with the land returned to its jurisdiction, under the provisions of the late Ontario statute, or in any other competent manner as may seem just and appropriate under all circumstances.

But under the belief perhaps on both sides that much or something might be gained by transferring the date of discovery to an earlier month, when the ground was not covered with snow, and by proving that the actual discoveries were then made by Hanes, the area of investigation has been enlarged far beyond the bounds of what was needful for the determination of the vital issue between the litigants.

On this head the grave difficulty encountered by the defence has been to find a week in November during which Hanes could be clearly proved to be absent from the city, and wherein his visit could be fitted reasonably well. That is the problem propounded by Hanes himself. His nearest approach to accuracy as to times is that he left Toronto on a Thursday night and would be in the Temiscaming district on the evening of the next day; that he was four days in the Cobalt region; that he returned on a Wednesday, which would bring

him to Toronto again on Thursday night. The journey, therefore, embraced a full week, and at the outset of his examination he thought that his trip began early in the month and before the 15th November. By this reckoning his excursion would begin on Thursday 3rd November and end on Thursday 10th November. But the witnesses called to substantiate a visit in November favour a later date, after "Thanksgiving day," which was 17th November, 1904, although all (like Hanes himself) speak with excessive vagueness. As to time they all agree in testimony of uniform uncertainty; but in other details they disagree. Miss Turner says that Hanes told her he was going north twice in November and then in December; as to what time it was in November, cannot remember; is certain he told her in November—hesitates—thinks it must have been in November, but is clear that he was not a week absent from her boarding house in November. Mr. Grover met Hanes about 18th or 20th November; had room and meal at Kerr Lake together, then both went to Cobalt and had dinner together; slept on floor together and had breakfast next morning at Sansterre; only met him that once. Fixes time by his shifting camp from Kerr Lake on 25th November up to near Cobalt, and saw Hanes before camp shifted. Mr. McGregor saw Hanes at the Grover camp at Kerr Lake around middle or towards end of November. Saw Hanes a few times in 3 days. He and Grover saw Hanes the second day after Hanes had dinner in Grover tent. He fixes dates by having made note of a big snow storm on 2nd December, which appears to have been omitted from the meteorological observations at Haileybury. Mr. Herman was introduced to Hanes by Grover in the latter part of November, 1904, and he put up Hanes for two nights in his (Herman's) camp. Grover's camp was then a quarter of a mile off at Cobalt. This rather conflicts with Grover's dates, as he puts his camp at Kerr Lake at the time of Hanes's visit. If Herman is right, the visit would be after 25th of November (which was a Friday).

Leaving this state of uncertainty and turning to the evidence on the other side, we find by the record of attendance kept at the School of Science something presumably more accurate as to the student Hanes's movements. First of all he asked and obtained leave of absence in December; not so in November. Next, he is marked as being present for all the week ending on Friday 11th November, and as being

present from 14th to 16th November, and again present from 21st to 25th November, and also on Monday 28th November. These records are verified by the teachers Mickle and Bain, and, as the scholars in Mickle's class were only 6 and in Bain's only 5 (Hanes being in each), they could readily keep track of who was present.

Raymond says that Hanes, his school-mate and fellow-boarder, told him that he was going to his home in Windsor over Thanksgiving day; he met Hanes on Monday (21st November) on his return, and made inquiries and received answers as to certain friends in Windsor whom Raymond knew.

And still further Mr. Blair was at Cobalt on 17th, 18th, and 19th November, 1904, slept at Sansterre, and saw no sign of Hanes being there. He saw Hanes in Toronto on 25th November, 1904, who told Blair that he intended to take a trip into Cobalt and see the country. As to Mr. Blair's accuracy, I have no doubt; so that all this cumulative evidence by the plaintiff as to the whereabouts of Hanes in November renders it difficult to be assured of his presence at Cobalt in that month.

Hanes could recall in the witness box no person, no place, no event connected with his November visit by which his movements could be checked or followed. Now it is passing strange that the comely presence of Madame Sansterre (who tipped the scales at 220 lbs., as her brother remarked) should have slipped clean out of his memory. She presided over the mining camp where he slept once (according to Grover) and had some meals, and into her hand was paid the 25 cents for each item of bed and board. Strange that he forgot the incident graphically described by Mr. Grover, with whom he rested on the floor of a small chamber off the dining camp one sharp November night, with the one blanket furnished by Madame as a covering for both. And the two nights following when the hospitality of Mr. Herman supplied Hanes with the free use of a bed in his shack; the contrast of that cosy bunk with springs—all to himself—and the cold comfort of the former night on the floor—could that have escaped the ordinary mind?

Three or four persons called for the defence, in addition to the above instances, had much more vivid recollections of Mr. Hanes's visit to Cobalt in November than he

had himself. Many blanks were filled up by their bold touches. For instance, one voluble witness recalled the novel appearance Hanes presented wearing the white collar of civilization in combination with the pick of the prospector. The incongruity impressed his memory. Hanes, however, by his account carried and had no pick, but contented himself with using his boot to kick off tractable specimens of rock.

Taking together the whole of the evidence for and against . . . with all its contrasts and contradictions, I find no substantial residuum which supports the claim of Hanes in regard to his November discoveries.

Hanes's own conduct, his remarkable nescience as to any person, place, or event which might enable one to trace his course or check his visits to the various lots in November (manifested during the two days of his examination at the opening of the case) appears to me to be the strongest factor against him. His rejection of the three opportunities given him to explain his course of prospecting or to indicate the manner of his finds, in the call made upon him by the department to go over the territory, in the further request made during his interview with the Attorney-General, and again during the trial his inability to trace upon the map his course of travel in the district—these add to the general air of unreality which surrounds the narration of his explorations.

The antagonistic attitude he took in response to Mr. Gibson's letter as being in the nature of an arbitrary demand was surely ill-advised. It is quite obvious that the Crown, i.e., the government, had the right to require from Hanes proper explanations and verification in a case where the pretensions of the discoverer might be fairly challenged. His failure to comply or to attempt to comply with the call is a strong indication that he dared not risk the crucial test. If it be, as put in the defence, that the path along the transit line by the side or marking the boundary of these lots in the 4th is plain and well defined, of 2 or 3 feet in width, through the woods and over the hills (as Hargrave testifies); if it be, that the evidences of mineral wealth are so abundant and to the searching eye so obtrusive along the way side (as Grover affirms); if it be that the conditions for observation are as favourable in May as in November from the absence of herbage and foilage (as Herman declares); and if it be,

that Hanes is an experienced woodsman familiar with lumbering operations in the brush from his earliest years (as Mr. Johnson points out); why then did he hesitate to repeat in May what he had so easily achieved in November?

These salient points of difficulty are not obviated by the explanation offered in argument as to the secretiveness of Hanes and his "peculiar mentality." Why should he be reticent to the professors who promoted his scientific studies and suggested the visit to Cobalt and the assay of its products?

Why conceal what he had found from his associates in the venture (Williams and Rutherford), which took shape in October and in whose behalf he made the exploration? Why disclose to Miss Turner that he was going to visit Cobalt in November and on his return why tell her of his discoveries there?

Why mislead his fellow boarder and fellow student Raymond by telling him at the same time in November that he was going to his home in Windsor?

Why lead Mr. Blair and the professors to believe that in December was his first and only visit to the Cobalt district?

Why is his memory so vacant as to incidents and persons in Cobalt, and so full of detail as to the making of the Rodd affidavit in September, 1905—details which Mr. Hargrave fails to recall?

The "peculiar mentality" theory is an ingenious suggestion, but does it explain? Does it convince? I am content to leave this branch of the November inquiry in this interrogative stage; for it may possibly still be open to prove by incontestable evidence that Hanes visited those places in November, 1904. If the leases are set aside, the whole matter will then be open for the government to deal with, on the merits of the competing discoverers, or as otherwise advised.

To return to the starting point, the matter mainly in issue as to the sufficiency of the affidavit has now to be critically viewed, and satisfactory evidence given that the material laid before the Crown on which the grant was based is true in substance and in fact. Even in *ex parte* applications to the Court, special care is called for that no relevant information should be withheld and that no misleading information should be given, to the end that a fair and full presentation be made of all the material facts. This rule of ethics applies *a fortiori* when the Crown is approached for the concession of

valuable rights, properties, and privileges. There must be no attempt to disguise the true nature of the transaction; no false or untrue statements made to evade or to conceal, and especially so when the essential matters to be established require to be authenticated by sworn testimony. The all important point here is the affidavit of actual discovery of valuable minerals in situ, that is, upon the lot or parcel which may be claimed. This involves a specification of the locality, the date of discovery, and the nature or particulars of the "find." There must be such particularity in the actual discovery that the person making claim shall be able to go to the spot, and if required, point out what he has discovered. There must be particularity both as to the precise site of the ore or mineral and as to its character or quality. There must be besides priority in point of time as to discovery in order to bring the applicant within the meaning of a first discoverer; all these are pre-requisites to be established if the applicant's pretensions are questioned by the Crown.

There has been a line of *ex post facto* evidence presented which has been urged as a reason for accepting Hanes as the actual discoverer whose priority should be recognized by the Crown. This again is an argument not for the Court to support a faulty affidavit, but to be used for the consideration of the Crown. But I may briefly advert to this argument derived from the blue print or sketch enclosed in Hanes's first letter to Hargrave of 3rd March, 1905. This blue print has been lost, but the diversity of recollection as to what it displayed deprives it of much evidential value. Hanes was asked to re-draw this sketch, of which he had made the original, and his production varies greatly from the description of the sketch by other witnesses. The other witnesses all disagree among themselves. I think that greater reliance may be placed upon his fac-simile made in Court than on the uncertain memory of others who saw the original.

Hargrave said that Hanes told him of no discoveries he had made except as marked on this map or sketch. Hargrave said he located Hanes's discoveries on the lots on the place indicated by Hanes, but he had not the sketch with him. It was, he says, "very rude," and the government map had come out in the interval before his first visit to Cobalt in the middle of May, and he used a copy of the government map to guide him. The vein was found he says on the north-east corner of 3 in the 4th, near the boundary line, and just

as near as you could make it on the plan, and that was called the verification of Hanes's discovery.

As to variations of recollection about this blue print; Hargrave says lot 3 in the 5th was not marked on the blue print; a straight line was over both lots (2 and 3 in the 4th) to mark the site of the ore. Bisland says the blue print had a number of marks, 9 in all, each a quarter of an inch long, shewing where the properties were on which finds had been made and being worked; lines marked where the veins were supposed to be, and their direction. Lines shewed the trend of the vein as found in the district up to that time. The lots shewing veins had heavier lines round their boundaries—that is, all the 9 lots.

White says that the heavier blue lines were only round the three lots in question, which were thus easily distinguishable. He says there was a short line near the centre of 3 in 5. He says the line of white did not go to Jacob's lot on blue print.

According to Mrs. Hargrave, Hanes explained in April the white line as being "the point of discovery."

Wallbridge says the lines round the three lots in question were the same as round all the others, and Hanes pointed out his discovery by a line close to the north-east boundary of lot 3; he makes the size of the blue print much smaller than any of the others who speak of it, and he says there was a short line coming from Jacob's lot on to the other (i.e., 3), and that the boundary lines of the 640-acre section were heavier than the others.

Now Hanes's sketch made in Court is wide apart from all these descriptions in this, that the one line of white in his map is about an inch in length, and runs from about the lower third of Jacob's lot south to about the middle of lot 3 in 4th, and there is no mark on lot 2 in 3rd. I have no doubt that this mark was to indicate what he told Hanes about the place orally, and also set forth in his affidavit of September, 1905, viz., that the line shewed the vein beginning in Jacob's property, which was supposed to extend into the lots he offered to sell. Not that he had discovered the vein, but was rather going upon what he had heard from others, viz., his father and Professor Miller—that the vein in Jacob's lot to the north had its extensions in the land to the south of Jacob's lot. The idea of his pointing to the place of his discovery by means of this mark in the sketch on a map in which one inch

would represent about a quarter of a mile, only shews the general vagueness of his information. This sketch altogether repels the idea of specific local discovery which could be identified in anything but the most vague way. The sketch, therefore, does not seem to me to carry the proof any further than if it had not existed.

Another matter calls for brief comment. It is said^d that Hanes stated "incidentally" in the government office after or about the time Whitson passed the claim, that he had made the discovery in the first place in November. Being asked by the solicitor why he had not made the affidavit when he made the discovery, Hanes said that the other affidavits had been made in December. It did not occur to the solicitor to have the affidavit corrected. It was left as it was because "the Crown judged it and passed it." It was said that this conversation was heard by the officer Whitson. He denies it, and says, had it been so, he would not have proceeded at that time to complete and sanction the application. But then was the time, when this November phase of the matter was first disclosed by Hanes, to have had the application corrected and not glossed over. The Crown judges indeed of the affidavit, but let the judgment be passed upon honest and substantial material according to the very truth of the transaction, and not according to something that somebody deems its equivalent.

In my opinion, the affidavit in this case is not a true disclosure of the real facts of the discovery. The issue of the leases thereon by the subordinate officers, pending inquiries made and explanations sought by the Commissioner and another branch of the office, was improvident, and the grants should be vacated. I do not find proved any conspiracy or fraud on the part of the defendants who now own the mine. As stated in *Attorney-General v. McNulty*, 8 Gr. 324, 11 Gr. 281, 581, they were right in doing all they could to uphold a patent issued in their favour, and their conduct is not such that they should be visited with costs.

They are also entitled to be compensated by the Crown for the expenditure made by them on the property, in so far as it has enhanced its value as a mining property; this to be ascertained by the Master, without costs to either in case they cannot agree as to amount.

The protection afforded to purchasers by the Land Titles Act does not really apply to this controversy—where the root

of the title is struck at in the grant to the first holders and those in the same interests with them, and where no purchaser for value has intervened. The defendants who obtained the Crown leases by means of a misrepresentation of facts in the essential affidavit cannot hold as against the Crown (however innocent they may be), and thereby take advantage of their own motion in misleading the Crown. Any transfer of interest subsequently was made and taken with notice of the Crown's intention to impeach the transaction being placed on record.

ANGLIN, J.

JUNE 26TH, 1906.

WEEKLY COURT.

MITCHELL v. MACKENZIE.

Costs—Action—Injunction—Partnership — Fraud — Master and Servant—Disclosure by Servant of Master's Business Secrets — Use in another Action — Action Becoming Unnecessary—Summary Disposition of Costs.

Motion by plaintiffs for an interim injunction, turned by agreement into a motion for judgment.

H. Guthrie, K.C., and W. E. Middleton, for plaintiffs.

E. D. Armour, K.C., for defendants.

ANGLIN, J.:—This action was brought to restrain the defendant Mackenzie, a bookkeeper in the employment of plaintiffs, from disclosing to his co-defendants, Cutten and England, information concerning the business of plaintiffs, obtained by Mackenzie in the course of his employment, and from giving such information in evidence in a then pending action, wherein his co-defendants were plaintiffs and the present plaintiffs were defendants, and to restrain the defendants Cutten and England from using any such information already obtained by them from Mackenzie for the purpose of such other action or otherwise.

A motion for an interim injunction was heard by Meredith, J., and referred by him to the Judge who should try the action of Cutten v. Mitchell. The judgment of Meredith, J., is reported in 6 O. W. R. 564. In Cutten v. Mitchell the plaintiffs, Cutten and England, sought a declaration that they were partners of the defendants in that action, Mitchell

and Foster, and an account, etc., on that basis; and, in the alternative, claimed to set aside as fraudulent certain statements furnished to them as servants of the defendants entitled by agreement to share in the profits of the defendants' business, and an account of such profits.

Upon the motion for an interim injunction in this action the present defendants resisted the plaintiffs' claim, on the grounds that, if Cutten and England were, as they and Mackenzie alleged and believed, partners of Mitchell and Foster, Mackenzie's right to communicate the information was clear, and that, because they disclosed fraud on the part of Mitchell and Foster against Cutten and England, Mackenzie was at liberty to inform his co-defendants of facts which they could call upon him to prove at the trial of the action of Cutten v. Mitchell.

The action of Cutten v. Mitchell was tried at Guelph in November, 1905, and resulted in the plaintiffs failing to establish that they were partners of Mitchell and Foster. They, however, succeeded in shewing that the statements of profits, furnished them as servants entitled to share in profits, were false and fraudulent, in that the defendant Mitchell had deducted from gross earnings a salary for himself of \$2,500 per annum, in lieu of \$1,500, to which he was by agreement with plaintiffs entitled—a fact which did not appear on the statements, and was intentionally and fraudulently concealed from plaintiffs. Other charges of fraud the plaintiffs failed to establish. They recovered judgment for the proportion of the salary wrongfully taken by Mitchell to which under their agreement they were entitled as profits, but were denied the right to a general accounting by the defendants: 6 O. W. R. 629. See also S. C., 6 O. W. R. 497.

The hearing of the injunction motion in this action of Mitchell v. Mackenzie was adjourned sine die, and now comes before me for disposition, the parties agreeing that it shall be turned into a motion for judgment, and that, because its further prosecution can serve no purpose, the action should be dismissed, and asking me to deal with the costs of the action, to which they both claim to be entitled.

In so far as plaintiffs sought to restrain the defendant Mackenzie from giving evidence at the trial of Cutten v. Mitchell, or to prevent the other defendants calling him as a witness, the present action was misconceived: *Beer v. Ward, Jacobs* 77. There was also serious difficulty in the applica-

tion of plaintiffs to restrain the defendant Mackenzie by interim injunction from disclosing information concerning the business in question to persons by whom he claimed to be employed, alleging, and, it may be, really believing, that they were partners with plaintiffs. Without disposing upon affidavit evidence of this issue of partnership, which stood for trial in the other action, Meredith, J., could not well have granted the motion made to him. But, as a result of the trial of *Cutten v. Mitchell*, it is now apparent that the claim of partnership had no foundation. Moreover, the charges of fraud, in respect to which the plaintiffs in the present action sought to prevent Mackenzie giving information to his co-defendants, were not established. It is also admitted by Mackenzie that he had given to his co-defendants information extracted by him from the books of his employers as to their business transactions anterior to the time at which it was claimed by these defendants that they became partners with the plaintiffs. Indeed, it is reasonably clear that Mackenzie remained in the employment of plaintiffs for some months after Cutten and England had severed their connection with the business, with their knowledge and concurrence, if not at their instigation, for the purpose of obtaining and furnishing to them information from books and papers to which his employment gave him access. This conduct of the defendants was certainly highly reprehensible.

Although they may not have been entitled to all the relief they sought, and their motion for interim injunction was probably ill-advised, the plaintiffs, Mitchell and Foster, seem to have had some very substantial grounds for bringing this action. In these circumstances, I think the proper course in dismissing it is to refuse costs to either party, and I direct that judgment be entered accordingly.

FALCONBRIDGE, C.J.

JUNE 27TH, 1906.

WEEKLY COURT.

RE FOLEY.

Will — Construction — Annuities — Deficiency — Arrears — Death of Annuitants — Application of Accumulated Income — Residuary Bequest to Charities.

Motion by the executors and trustees under the will of Almira Grover Foley, deceased, for an order determining a

question arising under the will concerning the estate of the testatrix, namely: "Is any and if so what part of the residuary estate of the testatrix applicable to charitable uses at the present time or during the lifetime of any of the annuitants named in the will and codicils, and, if not so applicable, what is the proper disposition after the death of any of the annuitants named in the will and codicils of the proportion of the income or revenue theretofore required to pay the annuity of any deceased annuitant?"

The testatrix died on 22nd September, 1892. Her will was dated 17th November, 1877, and there were 4 codicils, dated respectively 23rd November, 1880, 16th September, 1885, 20th October, 1886, and 10th February, 1892.

The material portions of the will and codicils were as follows:—

"Sixth, I will and direct that any part of my estate not definitely disposed of shall be held in trust as part of my residuary estate by my executors, for the benefit of the sober and industrious but destitute or needy widows and orphans of the county of Peterborough, who must have been bona fide residents of the said county before becoming destitute or needy. . . .

"Eighthly, . . . I also give and bequeath to . . . Mary A. Grover \$50 yearly and every year during her natural life. . . .

"Ninthly, I give and bequeath to John Almers Butterfield, of Norwood, an annuity of \$500 during his natural life. From and after the decease of the said John Almers Butterfield, I give and bequeath to the wife and each of the daughters of the said John Almers Butterfield \$125 yearly and every year during life; at the decease of each the annuity shall lapse and become part of my residuary estate and used as herein directed. . . ."

[Then followed the bequests of a number of other legacies.]

"All the herein mentioned annuities are to commence immediately after my decease, and end with the life of each legatee, and each and all are to become part of my residuary estate, and shall be kept by my executors and carefully invested for the benefit, comfort, and support of poor and needy widows and orphans or other suffering but worthy persons. No claim for legacy shall be paid until one year

after my decease. . . . The interest alone is to be used, the principal must be kept invested and be a fund forever, and if not immediately needed, let it accumulate for the benefit of future generations, and let the accumulated interest become capital or principal. . . .

“In consequence of the fluctuation in the value of stocks and interest, the said estate may be more or less than expected by me, so in any case I will and direct that each of the different legacies be increased or diminished per ratio, that each may gain or lose in proportion to the amount bequeathed in said will. . . .”

It appeared by an affidavit sworn 22nd May, 1906, and filed in support of the present application, that several of the annuitants had died, but others were still alive; that the executors and trustees had on hand \$960, representing the total income or revenue of the estate that would have been paid to the deceased annuitants if they were still alive, with certain interest accrued thereon, that a committee had been organized to manage the funds provided by the will for the relief of the poor in the county of Peterborough, and a demand had been made on behalf of the committee for payment over of the \$960 and any further sums that might be in the hands of the trustees in consequence of the death of any of the annuitants.

J. B. Holden, for the executors and trustees.

E. A. Peck, Peterborough, for the committee appointed to manage the funds applicable to charity.

H. D. Hall, Peterborough, for the annuitants under the will.

FALCONBRIDGE, C.J.:—It was the intention of the testatrix that the payment of annuities should commence immediately after her decease, but, as a matter of fact, the annuitants received nothing for about 3 years, and have not except during the last year or two received the whole amount of their annuities. It was not the intention of the testatrix that the sum which represents the income or revenue which would have been paid to deceased annuitants should be applicable for charitable uses during the lifetime of any annuitant claiming under the will who has suffered any deficiency. The amount, therefore, of \$960 and any further sum which may accrue by reason of the death of annuitants should

be placed to capital account, and the income thereof applied to supplement pro rata the past shortage in annuities until the last mortal annuitant shall have departed this life or shall have received the full amount of his or her arrears.

Order declaring accordingly. Costs of all parties out of the fund.

ANGLIN, J.

JUNE 28TH, 1906.

WEEKLY COURT.

BROCK v. CLINE.

Bankruptcy and Insolvency — Assignment for Benefit of Creditors—Motion for Removal of Assignee—Interim Injunction against Acting—Order Appointing Additional Assignee to Sell Assets of Estate—Terms—Reference—Costs.

Motion by plaintiffs for removal of the assignee of an insolvent estate—the defendant Cline, who had been restrained by order of FALCONBRIDGE, C.J., from acting as assignee, except for the preservation of the assets of the estate, until the trial of this action. The present motion was based solely upon the importance of a speedy sale of the assets, and in no wise upon misconduct or unfitness of the assignee.

H. Cassels, K.C., for plaintiffs.

C. A. Moss, for defendants.

ANGLIN, J.:—To grant the motion of plaintiffs would be, in effect, to give them judgment in the action—except as to costs. This is not, in my opinion, warranted by the material. The order of the Chief Justice, having regard to the provisions of Rule 617, impliedly determines that the right of the defendant Cline to the office of assignee is a proper subject for trial rather than for summary disposition upon motion.

The desirability of an immediate sale is not questioned. I have seen the Chief Justice and have his full approval of any variation of his order requisite to permit of such sale being had.

After a careful consideration of all the matters urged upon me, I have determined that the order will best protect the interests of all the creditors, with the slightest prejudice to the position of the defendant Cline, is that which I should make.

The defendants' counsel suggested a sale by Cline as assignee, or a sale under the supervision of the Court. Plaintiffs object strenuously to a sale by Mr. Cline—and urge that a sale by the Court, besides being costly, has disadvantages not incident to a sale by an assignee. They urge that Mr. Clarkson or Mr. Barber be appointed to sell the assets, acting as assignee for that purpose, if the Court will not substitute one of these gentlemen for Mr. Cline as assignee for all purposes.

I think the proper course, to attain the ends I have indicated as desirable, is to appoint Mr. Clarkson as an additional assignee, under sec. 8 of the statute, limiting his powers and duties to a sale of the assets, and payment into Court of the proceeds of such sale to the joint credit of the accountant and Robert S. Cline. The order appointing Mr. Clarkson will direct that he may sell the assets in any such manner as is usually adopted for the sale of insolvent estates by assignees, and at such time and place as meets the approval of the chief clerk in the office of the Master in Ordinary, to whom this matter will be, for that purpose, referred. Costs of this motion and of the reference will be reserved to be disposed of by the Judge presiding at the trial of this action, and, if not so disposed of, will be costs in the cause.

The defendant Cline will, of course, facilitate the sale of the assets by Mr. Clarkson, and will deliver possession to the purchasers at such sale upon Mr. Clarkson's order.

This sale may proceed during vacation. Mr. Clarkson's reasonable fees and disbursements will be a charge upon the moneys to be paid into Court, and will be fixed by the chief clerk under the reference to him.

CARTWRIGHT, MASTER.

JUNE 29TH, 1906.

CHAMBERS.

O'LEARY v. GORDON.

Counterclaim—Exclusion of—Terms—Action for Conspiracy against Three Defendants—Counterclaim by One Defendant on Promissory Note—Division Court Jurisdiction.

Motion by plaintiff for an order striking out the counterclaim of defendant Kidd.

Gideon Grant, for plaintiff.

A. B. Armstrong, for defendant Kidd.

THE MASTER:—The action is for an alleged unlawful conspiracy and registration of a deed which had been left by plaintiff with one of three defendants to be held in escrow until certain arrangements had been made.

Defendant Kidd has put in a counterclaim on a note claiming a little less than \$100.

No doubt, every motion of this kind must be decided on its own facts, and where plaintiff's claim is of the same class as the counterclaim, and the counterclaim itself would enure to the benefit of all the defendants, no objection could ordinarily be raised.

Here, however, plaintiff's action is for unliquidated damages, and is to be tried by a jury. The counterclaim is apparently within the jurisdiction of a Division Court, and could easily be disposed of before the action can be tried at Barrie on 24th September.

Under these circumstances, it might prejudice plaintiff's case to have a comparatively trivial matter, in which only one of the three defendants is interested, gone into at the trial. The claim itself, as I understand, is of some standing, and was apparently not thought by Kidd to be of any great importance.

Even if the counterclaim were established, it might not avail the other defendants—though it could be used as a shield by Kidd in case plaintiff was seeking to enforce a recovery for damages against him.

It would seem that the best order to make is that the counterclaim be struck out without prejudice to any action that Kidd may bring, and that plaintiff shall not, without leave of the Court or a Judge, issue execution against Kidd on any judgment he may obtain in this action until the counterclaim has been disposed of.

The costs of the motion will be in the cause as between plaintiff and defendant Kidd.

MABEE, J.

JUNE 29TH, 1906.

WEEKLY COURT.

RE ALMONTE BOARD OF EDUCATION AND TOWNSHIP OF RAMSAY.

Public Schools—Motion to Quash By-law Altering Boundaries of School Sections—Forum for Determining Validity—County Court Judge—6 Edw. VII. ch. 53, sec. 29, sub-sec. 4 (O.)—Dismissal of Application to High Court.

Motion by the Almonte Board of Education to quash a by-law of the municipal council of the township of Ramsay.

G. Wilkie, for applicants.

W. E. Middleton, for respondents.

MABEE, J.:—On 3rd March, 1906, the township council of Ramsay passed a by-law No. 563, intituled "A by-law altering the boundaries of School Section No. 13 (Almonte) and 12 in the Township of Ramsay," and by this by-law purport to enact that lots 13 and 14 in concession 10, Ramsay, be detached from school section No. 13, Almonte, and attached to school section No. 12. It is recited in the by-law that power is given to municipal councils by the Public Schools Act to alter the boundaries of school sections. The by-law is to come into effect from and after 25th December, 1906. The secretary of the Board of Education, in an affidavit dated 13th June, states that a copy of this by-law was served upon him on 21st May, 1906, by the clerk of the township of Ramsay. The notice of motion to quash this by-law was served on 20th June instant.

The statute 6 Edw. VII. ch. 53 (O.), assented to on 14th May, 1906, materially changes the procedure upon matters of the kind involved in this motion, and I am of the opinion that sub-sec. 4 of sec. 29 has deprived the High Court of jurisdiction to entertain this application, except in the event of an appeal as provided for in the section. The only matter arising for the consideration of the Court is as to the validity of this by-law touching the alteration of this school section, and the Act provides that this shall not be raised or determined by a proceeding in the High Court, but shall be raised, heard, and determined upon a summary application to the

Judge of the County or District Court in which such school section, or some part thereof, is situate, provision being made for an appeal, subject to the limitations of the section. This Act was in force prior to the service of the by-law upon the applicants, and long before the service of the notice of motion.

I think the application should have been to the County Court Judge, and I dispose of it upon that ground alone.

The motion must be refused with costs.

BOYD, C.

JUNE 29TH, 1906.

TRIAL.

IMPERIAL BANK OF CANADA v. ROYAL INS. CO.

Fire Insurance—Breach of Statutory Condition—Subsequent Insurance without Assent of Defendants—Notice—Knowledge of Sub-agent—Dismissal of Action on Policy—Refund of Premium—Costs.

Action upon a policy of fire insurance.

BOYD, C.:—The condition of this contract of insurance, which is also the statutory condition (R. S. O. ch. 203, sec. 168, No. 8, p. 2044), provides that the company shall not be liable if any subsequent insurance is effected by any other company unless and until the company assents thereto, etc. There was no notice given in writing of the subsequent insurance, nor any communication thereof by the insured to the company, or to any agent of the company having power in that behalf to receive such notice. There was in fact no notice given to the company in any way that such subsequent insurance had been made or existed before the loss. The attempt to fix constructive notice on the company, through the circumstance that the subsequent insurance was effected through one Cummings, who had also acted in procuring the insurance with the defendants, as a sub-agent or broker in insurance for their recognized general agent at Winnipeg, and that because he, Cummings, knew of the amount of prior insurance with the defendants, and was also the person who obtained the subsequent insurance, therefore his common intermediate agency for both companies should bring home

knowledge of what he had done to the head office of the defendants—is altogether too sweeping a conclusion. It would be a dangerous development and stretch of the doctrine of agency which would deserve to be called destructive rather than constructive. The cases cited . . . and others are all against this attempt to control the policy of the company as to the extent and nature of the risk to be assumed by delegation to an unknown somebody, who worked in secret as to this subsequent insurance, and made no communication of it to any officer or agent of the company. The fact of its existence was only disclosed to defendants when their adjuster appeared upon the ground after the fire, and they at once promptly repudiated any liability.

As to authorities, I would confine myself to citing *Western Assurance Co. v. Doull*, 12 S. C. R. 454 (per Strong, J., particularly), and an affirmation of the same rule in the Supreme Court of the United States, *Northern Assurance Co. v. Grand View Building Association*, 183 U. S. 308, 319.

The company should make a refund of the last payment of premium, \$112.50, which was received in ignorance that the policy was no longer in force by reason of the subsequent insurance. And as to costs, the company should get the costs of action, less costs incurred in the other issues as to fraud, which were abandoned at the trial; these to be set off, and judgment framed accordingly.

BOYD, C.

JUNE 29TH, 1906.

TRIAL.

HERRIMAN v. PULLING & CO.

Trespass to Land—Boundaries—Water Lot—Road Allowance—Encroachment—Right of User—Navigable Water—Injunction—Damages—Reference—Costs—Parties—Indemnity—Guarantee.

Action for trespass to land.

BOYD, C.:—According to the record, plaintiff has no controversy with defendant Collins. He is brought in at the instance of his co-defendants Pulling & Co. in order to indemnify the latter on his alleged guarantee. I do not find that

Collins gave any such guarantee, and he is, therefore, an unnecessary party, and should be dismissed with costs to be paid by his co-defendants.

As between plaintiff and Pulling & Co., I find that the latter have trespassed upon plaintiff's land, and should have damages therefor, and that all the defendants should be enjoined from their continued user of plaintiff's land as a piling and loading ground both on land and on the water lot in front. To avoid the expense of a reference, I find that damages should be assessed only for the one year preceding action, and I fix the amount at \$100; but subject to that being increased or lessened upon a reference, if either party desires to have a reference to the Master. In the event of a reference, the Master will deal with the subsequent costs. The costs of action up to judgment to be paid by defendants to plaintiff.

I do not find sufficient evidence here as against the Crown and the municipality to say that the chain reservation along the shore has become the property of plaintiff. That title, if it exists in plaintiff, should be manifested by by-law, and also, I think, by some evidence of assent on the part of the Crown: see Municipal Act, 1903, sec. 640, sub-sec. 11, which, though in terms only applying to a sale of road allowance, would seem to imply a like precaution in the case of an exchange with an adjoining owner under sec. 641. The reservation along the shore is not only for travel by land, but also contemplates public access by navigable water, and the complete control which a municipality might have over an inland road would not necessarily be extended to one along the shore of navigable water. Apart from this, I think the land between the chain along the shore and the level (rising or falling) of the water is, as against trespassers, the property of plaintiff, and as to which he is entitled to exclude defendants—as well as to exclude them from his land which extends for the chain reservation up to the boundary of Bay street and Grand Manitoulin road, and also to exclude them from the land covered with water embraced in plaintiff's deed of the water front. On all these points defendants have more or less encroached, and they should be restrained from so doing in the future till they arrange with plaintiff for making proper payment for the use of the land in lumbering operations.

It may be upon a matter of nice law that the road reserved along the shore, if it exists still as a road, would shift to the water's edge upon and over the accretion of 40 or 50 feet which is said to exist there between the road allowance as it was when the patent issued and the present water's edge, but this was not argued, nor is it essential to determine the precise point in this controversy. If it so shifts, it would only give plaintiff so much more soil on the landward side of the original allowance.

BOYD, C.

JUNE 29TH, 1906.

TRIAL.

OWEN v. MERCIER.

Vendor and Purchaser—Contract for Sale of Land—Right of Vendor to Repudiate before Completion—Illegal and Immoral Purpose of Purchaser—Delivery of Conveyance—Insufficient Description—Amendment and Insertion by Vendor of Forfeiture Clause—Cancellation of Conveyance—Equitable Relief—Terms.

Action by vendor to enforce a provision for forfeiture contained in a deed conveying land to defendant.

BOYD, C.:—This case is unique, but its difficulties may be solved, I think, by the application of some familiar doctrines of equity.

Divested of all immaterial details, the substance of the transaction was this: the owner (plaintiff) through his agent negotiated the sale of the land in question with another land agent, who put forward a servant of his as the ostensible purchaser, though I find as a fact that the object in acquiring the land was to secure it for the purposes of a woman who was a prostitute. The vendor signed a conveyance, but actually received no part of the price before he became aware of the use to which the property was to be put. He refused to go further in the way of completion unless some assurance was given that the land should not be used in the illicit traffic. Meanwhile the conveyance had been sent to the registry office and returned unregistered, for the reason that the description was so uncertain that the deed could not be registered. It

was then handed to the vendor with a request that he would insert words sufficient to identify the land properly. These words he added, but, to protect himself, also inserted a provision by which the land should be forfeited and returned to the owner in case a house of ill-fame should be erected and maintained thereon. The deed thus altered was taken and registered by the purchaser, and the transaction completed by payment to plaintiff. The purchaser asserts that this restrictive charge was not noticed at the time of the completion nor for some months afterwards, when the first woman was about to sell to another in the same trade.

Application was then made by the purchaser to the local Master of Titles in order that the objectionable clause might be expunged and the title cleared, and the Master having directed an action to be brought, it was brought in its present shape, in which the vendor is in form seeking relief, though essentially the litigation has been initiated by the purchaser. In any direct application by the proprietor of the house to free it and the land from the restriction, the Court would, no doubt, hold its hand; but to leave the property as it is with this restrictive registration and to leave the parties in statu quo is what neither party desires.

Apart from the question of the uncertain description and the Statute of Frauds, which would be open if the alterations in the conveyance are not accepted—a legal situation which would not be helped by the possession of defendant, for that was taken of her own motion and not under this contract of sale—I think the matter may be dealt with in another way.

I regard the transaction as not completed by a proper and legal conveyance at the time when the vendor raised his objection as to the use intended. Under our land system, with its method of statutory surveying and statutory registration, it is one of the terms of a contract of sale (when nothing is said to the contrary) that the sale should be completed and perfected by a proper conveyance susceptible of registration. This necessitates an accurate and certain local description by which the place can be identified on the ground, as well as its transfer recorded accurately in the register of conveyances. In this case there were two lots in close proximity to each other, on opposite sides of the river, and each answering the general and only description given, so that the deed was rightly rejected by the registrar in its original shape as not registrable. Till a proper registrable deed is executed, the

contract of sale is not complete, and to enforce the giving of such a conveyance would be the subject of a suit for specific performance. That is, I think, the correct situation in law of these litigants, though the pleadings are not framed on this theory. Still all the facts are before me, so that appropriate relief can be administered.

Given this condition, the Court will not only decline to enforce the contract further, it will also vacate and cancel it.

When the knowledge of the illegal purpose for which the property was being purchased came to the vendor—the contract yet being incomplete—he had an option to repudiate it. This he did, in legal effect, by inserting the words prohibiting such unlawful use and completing the conveyance in that shape. This was completing a different contract from that which was contemplated by the purchaser, and, in the circumstances, I do not think the purchaser should be held to this manner of completion. The purchaser repudiating this term inserted to legalize the dealing, it is quite competent for the owner to recede from the whole contract. . . .

[Reference to *Pringle v. Napanee*, 43 U. C. R. 306.]

• And in such a case he is not liable to answer in damages.

Without invoking the authorities applicable to a contract uncompleted or in fieri, it may well be that this is a case where the Court would exercise its power to cancel a transaction bottomed in illegality so far as the purchaser is concerned, by analogy to the cases where relief is given to one not in *pari delicto* with the chief offender: *Reynell v. Spry*, 1 DeG. M. & G. 660. The reasons for replacing the parties in their original state are akin to those in *W. v. B.*, 32 Beav. 574, and I come to the conclusion that the deed should be cancelled, its registration vacated, possession of property delivered to plaintiff upon terms that the purchase money, \$1,000, be repaid, and all permanent improvements made upon the property paid for by plaintiff after deducting occupation or other rent received by defendant since possession was taken. All proper outlay for taxes, etc., and allowances of interest to be taken into account, and the balance adjusted as between the parties by the Master, if they cannot agree. This judgment should be without costs, and so should the reference be conducted (if any) before the Master.

JUNE 29TH, 1906.

C.A.

RE DALTON AND CITY OF TORONTO.

Landlord and Tenant—Lease of Property of Municipal Corporation—Expiration of Term—Payment by Corporation for Buildings and Permanent Improvements—Filling-in of Water Lots—Work Done under Prior Leases—Evidence as to Meaning of "Permanent Improvements"—Admissibility—Work Done by Sub-tenant—Arbitration—Value of Buildings—"Worth"—Costs—Powers of Official Arbitrator—Statute—Retroactivity — Practice and Procedure — Discretion—Appeal.

Appeal by C. C. Dalton and cross-appeal by the city corporation from an award of the official arbitrator for the city of Toronto fixing the amount to be paid to Dalton for buildings and improvements upon land leased to him by the corporation for a term of years.

J. H. Macdonald, K.C., and G. W. Mason, for Dalton.

J. S. Fullerton, K.C., and H. L. Drayton, for the corporation.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, J.J.A.), was delivered by

GARROW, J.A.:—The claimant was the lessee from the city of property on and near the Esplanade, under an indenture of lease dated 21st September, 1887, for a term of 21 years from 1st June, 1883, which contained a provision for payment by the city for the buildings and permanent improvements at the end of the term in case the city should refuse to renew—the amount to be settled by arbitration. The city refused to renew, and the present proceedings were taken to fix the amount to which the claimant is entitled for such buildings and improvements. The arbitrator, after hearing evidence, fixed such amount at . . . \$19,188.50, and awarded the costs of the arbitration proceedings to the claimant, to be paid by the city.

The arbitrator refused to allow for the improvements on and north of the Esplanade and for the improvements made

by one Evans south of the Esplanade; the former because such improvements were not made under the lease, but under prior leases, and the latter because they were made by Evans and not by the claimant.

The real difficulty in dealing with the improvements made on and north of the Esplanade is caused by a term contained in the lease in these words: "And it is hereby declared and agreed that the buildings and permanent improvements now on the said demised premises are the property of the lessees." The improvements in question consist of "filling-in" with earth, the lots having been originally what are known as water lots. And it is not disputed that "filling-in" is in the nature of a permanent improvement for which in a proper case the tenant would be entitled to payment. But the contention of the city is that the "filling-in" on and north of the Esplanade was done in performance of agreements contained in the prior leases, by or for the tenants, and that when made they at once and as made became simply a part of the freehold, and not in any proper sense a "permanent improvement" within the meaning of the before-quoted clause. And this is the view adopted by the arbitrator, correctly in my opinion.

Objection was made by the claimant to the reception of evidence to explain the meaning of the term "permanent improvements" contained in the before-quoted clause, the arbitrator having referred to the terms of the prior leases and to the proceedings under them as explaining or tending to explain that this filling-in was not intended to be within the clause in question. The term "permanent improvements" is, of course, in a sense simple enough, but it is not by any means self-explanatory. It is not, of course, used in the lease in question in its broad sense, but in the sense in which the term is used as between landlord and tenant. The landlord might permanently improve his property by filling in or raising up its surface level, but what he did in that way could scarcely be called a "permanent improvement," within the proper meaning of the term as used in the lease in question, which meaning should, I think, be confined to improvements made and in a sense owned by the tenant.

What is really equivocal is not so much the language as the parcel, and the evidence objected to was, I think, properly received for the purpose of applying the language to its proper subject matter.

And the evidence shews that the improvement in dispute was really made by the landlord in performance by arrangement of the covenants of the lessees in the prior leases, who must otherwise have done the work at their own expense. And it follows, I think, that the work so done was not in fact a "permanent improvement" within the meaning of that term as used in the lease in question.

The filling-in done by Evans, however, stands on a quite different footing. This was work done after the date of the last lease. Evans's sub-lease apparently expired before the end of the claimant's term. Evans had a right under his lease to remove his buildings, but could not, of course, remove the filling-in, which he had done or which had been done upon his parcel during his term, and the benefit of that should, I think, enure to the claimant, it being plainly no answer by the city to the claim to say that the work was done by Evans and not by the claimant. Nor could the city intercept this claim by settling with Evans. He had the right to dispose of his buildings to the city, but he had no control over the filling-in. Nor is the contention that the claimant abandoned this claim borne out by the evidence, nor by the judgment, in which it is apparently dealt with on the merits. The Evans filling-in was there upon the demised premises. If the lease had been renewed, the lessee would have had its use for the new term exactly as he would have had the use of the filling done directly by himself. And in losing the renewal he loses the benefit and use of that improvement exactly as he loses the benefit and use of the other filling.

The quantity of filling done by Evans was, I think, 1,845 yards, which, at 25 cents per yard, would amount to \$461.25, to which extent the appeal should be allowed and the award increased.

With reference to the cross-appeal upon the question of value or amount allowed, I have not been convinced, after, in addition to the argument, a careful perusal of the evidence, that any error has been established. The exact language of the lease as to the improvements and their valuation is—"such reasonable sum as the buildings and permanent improvements made and erected thereon shall then be worth, such value to be determined," etc.

If the lease had been renewed, as the lessee desired, instead of terminated, the lessee would have been entitled to such renewal, under the express terms of the lease, without

regard to the value of the improvements. So that for the new term at least the lessee would have got the full benefit of the improvements without paying rent for them.

The term "worth" is perhaps a little vague. An article may be "worth" a great deal to one in much need of it, and very little to another who has no use for it. A permanent improvement or construction is sometimes of more actual value to use than it is to sell or to lease to another. It is, for instance, notorious that expensive farm buildings never increase the selling or leasing value of a farm by anything near the amount of the cost of such buildings. Here the tenant had and was using the improvements, and desired to continue to do so. They may have been "worth" more to him than to any one else, and yet the landlord should not be asked, in exercising his rights under the contract, to pay for something out of the ordinary and therefore not within the scope of the contract. Upon the whole I think that, in the circumstances, the arbitrator has attributed the correct meaning to the word "worth" in this sentence, which I quote from his judgment, as "a fair and reasonable market value, as would result from the bringing together of a willing buyer and a prudent seller," and, having regard to the meaning, I think the evidence warrants the conclusions reached.

Upon the other question raised by the cross-appeal, namely, the allowance of costs to the claimant, if these were in the discretion of the arbitrator, I should not be disposed to interfere. But it is contended that he had no power over the costs.

An agreement out of Court to refer is like any other agreement in this respect, that the rights of the parties are to be ascertained from the terms of the written agreement. Under the agreement in question, as it stood apart from the Municipal Arbitration Act, R. S. O. 1897 ch. 227, there was, in my opinion, no power to award costs. The legislature, however, has, no doubt for good cause, seen fit to invade the domain of such agreements, and to declare that, whether the parties desire it or not, the official arbitrator shall be the only arbitrator: see sec. 2, sub-sec. 1. And in providing the arbitrator the legislature has also defined his powers and the procedure to be followed in arbitrations before him. And in express terms has given him power over the question of costs: see sec. 2, sub-sec. 6. If the agreement of submission had conferred this power, resort to the statute would not have

been necessary, but where, as here, the agreement is silent upon the subject, it appears to me to be the reasonable conclusion that it was intended that the concluding words of sub-sec. 6 of sec. 2 were intended to apply in the case of all references in which the parties had not expressly stipulated to the contrary. The question is largely one of practice and procedure, in which case the rule . . . is apparently that the construction is retrospective unless there be some good reason against it: see *Freeman v. Moyes*, 1 A. & E. 338; *Wright v. Hale*, 6 H. & N. 227; *Kindray v. Draper*, L. R. 3 Q. B. 160. And "practice and procedure" apparently include the granting or withholding of costs: see *Wright v. Hale*, *supra*. It certainly would be scarcely logical to hold that the statute applied for the purpose of substituting the official arbitrator for the arbitrators stipulated for in the submission, but did not apply in also carrying into the submission the statutory powers of that official, including his control over the question of costs.

I am, for these reasons, of the opinion that the question of costs was within the control of the arbitrator, and I see no good reason why we should interfere with the discretion which he has exercised in awarding them to the claimant.

The cross-appeal should, therefore, be dismissed with costs, and the appeal allowed as to the Evans claim. . . . No costs of the appeal.

JUNE 29TH, 1906.

C.A.

NICKLE v. KINGSTON AND PEMBROKE R. W. CO.

Railway Company—Loan of Money to—Bill of Exchange—Acceptance—General Manager of Company—Statute of Limitations—Effect of Payment of Interest by General Manager in Reality on His Own Behalf—Absence of Knowledge of Holder of Bill—Inference as to Source of Payment.

Appeal by defendants the railway company from judgment of BRITTON, J., 6 O. W. R. 51, in favour of plaintiffs.

in an action to recover \$4,600 and interest upon a bill of exchange.

W. R. Riddell, K.C., for appellants.

J. L. Whiting, K.C., for plaintiffs.

The judgment of the Court (Moss, C.J.O., OSLER, GARROW, J.J.A.), was delivered by

GARROW, J.A.:—The statement of claim alleges that on 8th May, 1893, plaintiff Ellen Nickle lent to defendants the railway company \$4,600; that she assigned the debt to her son and co-plaintiff Hugh C. Nickle, and on 24th January, 1895, defendant B. W. Folger drew his draft for \$4,600, payable on demand, upon defendants the railway company, which was on the same day accepted for defendants the railway company, by defendant T. W. Nash, the secretary-treasurer of the railway company, and that the same was indorsed over to plaintiff Hugh C. Nickle in respect of the loan referred to; that interest on the loan was paid to 27th October, 1900; that payment of the draft was demanded on or about 31st August, 1904, and payment was refused, and notice of refusal was given to defendants; and plaintiffs claimed payment of the draft by defendants the railway company, or, in the alternative, payment of the loan by the company; and, in the event of it appearing that defendant T. W. Nash had no authority to accept the draft, that he might be held liable for having misrepresented his authority to do so. And it also set forth that judgment in default of appearance had been signed against defendant Folger.

Several defences were pleaded by defendants the railway company and also by defendant Nash, the latter pleading that he had authority, an issue found in his favour, and the action was accordingly dismissed as to him with costs.

The defences of defendants the railway company were: a denial of the loan to them; payment; a denial of the acceptance of the draft by them or by their authority; that if they did accept they paid the amount of the acceptance to the holder thereof upon demand, and that, if the same was indorsed over to plaintiff Hugh C. Nickle, it was so indorsed after payment had, to his knowledge, been made to the holder upon demand; and the Statute of Limitations, R. S. O. 1897 ch. 324, sec. 38.

Britton, J., held, upon amply sufficient evidence, that the loan was actually made as alleged by plaintiff, and that it had not been repaid, and he also held that the payments of interest which had been made from time to time were sufficient to defeat the defence of the Statute of Limitations.

Defendant Folger is a brother of plaintiff Ellen Nickle, and the uncle of the other plaintiff. He was at the time of the loan the general manager or highest executive officer of defendants the railway company. In that character he applied to plaintiff Ellen Nickle for the loan, not to himself, but to the railway company, and to such a loan she agreed. When the draft to secure the loan was prepared, under the direction of defendant Folger, it was, in accordance with their usual form and custom, made payable to the order of defendant Folger, and was by him indorsed over to plaintiff Ellen Nickle. It formed no part of the agreement with her, however, that defendant Folger should indorse or in any way guarantee the loan, and his doing so was his own unsolicited and entirely voluntary act.

The money was duly advanced by plaintiff Ellen Nickle to the company, and was used for their purposes, but, strange to say, by some faulty bookkeeping, the amount of the loan was placed to the credit of defendant Folger in the books of the company, although a negotiable instrument representing and securing the loan had been issued by the company to plaintiff Ellen Nickle. Why the entry was so made, or by whose directions, does not clearly appear, but a reasonable inference is that it was by the direction of defendant Folger.

The draft first issued was renewed from time to time until the final one in the series, that mentioned in the statement of claim, was issued.

On 31st March, 1899, the amount standing in the books of the company at the credit of defendant Folger, including the amount of the loan in question, was transferred in the books of the company to the credit of the firm of Folger Bros., of which defendant Folger was a member, presumably by the direction of defendant Folger, although that, too, is not very clear. But he was still the general manager, and remained so throughout the transactions in question, and his private account would probably not have been tampered with without his express direction. And this transfer is the payment pleaded by the company, for in no other way was the loan in any way repaid.

But plaintiff could not be affected by these manipulations of entries by defendant Folger for purposes of his own. They were and remained in entire ignorance of them, resting in the well-founded belief that the loan had been made to the company whose bill of exchange they or one of them held when these entries were made.

Down to the transfer to the credit of Folger Bros. the company paid the interest. The payments were actually made by the company to defendant Folger, of course by his direction, and were by him handed to plaintiffs or to one of them. After the transfer defendant Folger continued to pay the interest, apparently exactly as before, but really out of his own money. But of this of course plaintiffs were also wholly ignorant. They had no transaction with defendant Folger. They did not look to him personally for payment. It is even doubtful if they supposed that he was in any way liable upon the bill of exchange, and it is, at all events, clear upon the evidence that they believed the payments relied on to keep the claim alive were being made from time to time by defendant Folger simply in his character of agent for . . . the company. Of all which defendant Folger was well aware, and his knowledge must, in the circumstances, be imputed to . . . the company.

Indeed, on one occasion disclosed in the evidence, and not contradicted, he seems to have resorted to an unnecessary and gratuitous piece of deception to foster the idea that the interest payments were being made by the company; I refer to the payment in April, 1900, when he informed plaintiff Hugh C. Nickle that he could not make the payment until he received in his character of banker for the company a deposit from the company which he was expecting to be shortly made by another officer of the company.

Each payment made carried with it the implied promise to pay the balance. Defendants, by their general manager, induced plaintiffs to believe that the payments, and therefore the promise, came from . . . the company, and, relying and resting upon such belief, they refrained from calling in the principal. In these circumstances, it would be inequitable, in my opinion, to permit the company to set up the defence of the statute, a fraud in fact, and that they are and ought to be held estopped by the conduct of their officer from alleging that the payments in question were not in fact made by them.

But, even if the matter fell short of absolute estoppel, the company would still fail in their defence.

Under the secret dealings between the company and their general manager, the latter, no doubt, as between themselves, undertook the liability in question. But they were careful to conceal the facts from plaintiffs. . . .

[Reference to *In re Tucker*, [1894] 3 Ch. 429.]

Appeal dismissed with costs.

JUNE 29TH, 1906.

C.A.

LENNON v. EMPIRE LOAN AND SAVINGS CO.

Loan Company—Loan Corporations Act—Sale of Assets and Undertaking of Company to Another Company—Ratification by Shareholders—Rights of Holder of Terminating Stock—Substitution of Permanent Shares in Purchasing Company—Assent of Lieutenant-Governor in Council—Certificate of Attorney-General—Finality of—Absence of Schedule of Shareholders—Status of Holder—Creditor or Shareholder—Right of Withdrawal—Amendment of Statute—Securities.

Appeal by defendants the Empire Loan and Savings Co. and the Sun and Hastings Savings and Loan Co. from the judgment of MEREDITH, J., at the trial, declaring that plaintiff, a holder of terminating shares in the former company, was not bound by the provisions of the agreements between these companies to take permanent stock in the Sun and Hastings Co.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, JJ.A.

McGregor Young, for appellants.

J. Bicknell, K.C., and W. J. McWhinney, for plaintiff.

Moss, C.J.O.:—The Empire Loan and Savings Co. until the transactions and proceedings to be mentioned was a building society duly incorporated under the Loan Corporations

Act. The Sun and Hastings Savings and Loan Co. is a building society duly incorporated and now carrying on business under the same Act. A question was raised on the argument of the appeal whether these companies were incorporated and authorized to carry on businesses of a like character. An examination of the respective declarations and certificates of their incorporation and registration removes any doubt as to this. Indeed the statement of claim virtually admits that they are building societies of the same class, with the like powers, and the point was not suggested before the appeal.

These two companies entered into an agreement dated 8th August, 1903, for the sale by the Empire Co. to and the purchase by the Sun and Hastings Co. of all the assets and undertakings of the former company, subject to ratification and acceptance by the respective shareholders. This transaction was entered into under the provisions of R. S. O. 1897 ch. 205, enabling corporations answering the description of the two companies to sell or purchase their respective assets.

The provisional agreement was submitted to and received the ratification, confirmation, and assent of the shareholders of each of the companies. It was then, pursuant to the Act, filed with the Corporations Registrar, and was assented to by the Lieutenant-Governor in council on 9th December, 1903. Thereupon the Attorney-General for the province, being the Minister under whose directions the Act was being administered, gave his certificate, under the provisions of the Act, certifying the assent and the date thereof, and declaring that on, from, and after 9th December, 1903, the agreement took effect as the sale, transfer, and conveyance to the Sun and Hastings Savings and Loan Co., to its own use, of all the assets, undertaking, goodwill, business, property, interests, and rights of the Empire Loan and Savings Co., as in the agreement more fully set out, and that on, from, and after 9th December, 1903, all the terms, conditions, and provisions of the agreement and of the Loan Companies Act relating thereto went into full force and effect.

Section 45 of the Act enacts that the certificate shall be conclusive evidence of all matters therein certified or declared.

In the statement of claim plaintiff treats the transaction between the companies as a valid and effectual sale and trans-

fer by the Empire Co. to the Sun and Hastings Co., and his claim in the action, as against the latter company, is based upon the validity and effective operation of the agreement. At the trial evidence was received, against objection made on behalf of defendants, with the view of shewing that a schedule or list of shareholders of the Empire Co. and the amount they would receive in the event of the agreement being carried into effect, was not annexed to the agreement at the time it was approved by the shareholders or assented to by the Lieutenant-Governor in council. No amendment of the pleadings was allowed, and, so far as the evidence discloses, the want of the schedule occasioned no substantial prejudice to the shareholders. Its absence was explained at the shareholders' meeting, and it does not appear that the vote upon the question was affected one way or the other by what occurred. There is nothing in the Act requiring such a schedule to be attached to the agreement, and it was clearly intended as a protection to the Sun and Hastings Co.

In view of all the circumstances, and having regard to the certificate and its conclusive nature as declared by the Act, no reason exists for going behind it and inquiring into the antecedent proceedings.

It is quite apparent that the trial Judge attached no importance to the matter; the relief which he granted was on the footing of the agreement being valid and effective as a sale and transfer between the companies. And for the purposes of this action it must be so regarded.

Before and during the time of the transactions referred to, plaintiff was the holder of 5 certificates of stock in the Empire Co., known as "terminating prepaid stock," representing payments amounting to \$2,800, and one certificate of stock known as "dividend bearing terminating stock," representing a payment of \$200. This stock, as well as the stock held by a number of others, was the subject of a guarantee given by defendants the Trusts and Guarantee Co., under an arrangement with the Empire Co., whereby certain of its securities were to be held by the Trusts and Guarantee Co. for the benefit of the holder of certificates.

Plaintiff was notified of the meeting of shareholders called to ratify the agreement, and received with the notice a copy of the agreement, but he did not attend the ratification meeting which was held on 24th September, 1903.

On 18th September, 1903, he wrote the manager of the Empire Co., referring to the notice of the meeting which he had received, and stating that he would withdraw his money from the company before the "merging takes place," and expressing the hope that all the people who had given applications to him would be treated fairly and not be forced to take permanent stock in another company contrary to their wishes.

On 21st September he wrote the Trusts and Guarantee Co. notifying them of his holding, and that he positively refused to let the certificates pass into the hands of any other in exchange for permanent stock, and would hold the Trusts and Guarantee Co. responsible for due repayment of same.

Much correspondence followed before and after the final consummation of the sale and purchase. Plaintiff received from the Sun and Hastings Co. two dividend cheques in respect of stock allotted to him in that company, the first of which he retained and used; the second he retained for some months, but ultimately, after the commencement of the action, he returned it unused, together with the amount of the first cheque.

This action was commenced on 8th February, 1905. Plaintiff's claim is that he lent and advanced the moneys represented by the certificates to the Empire Co., and that he is a creditor of that company, and is now entitled to be paid the amount of his claim by both the companies, and that the securities held by the Trusts and Guarantee Co. are subject to his claim.

Defendants' answer is that plaintiff was a shareholder of the Empire Co.; that by the terms of the sale to the Sun and Hastings Co. the consideration for the purchase was that the latter company should allot and issue to holders of shares in the Empire Co., whether such shares were permanent or terminating stock, permanent shares of the Sun and Hastings Co. at \$104 per share of \$100, being at a premium of \$4 per share, as fully paid up and non-assessable, for an amount exactly equal to the net value of the assets of the Empire Co., less the amount of the debts, liabilities, and obligations of the latter company, these shares to be divided among the shareholders in proportion to their several holdings; that the agreement was finally completed in accordance with the Act, and the shares were duly allotted, and amongst the

others to plaintiff; that plaintiff is bound by the agreement; and that his position is now that of a holder of permanent stock in the Sun and Hastings Co. Estoppel by acceptance of the dividend cheques, and acquiescence and delay, are also urged against him.

Defendants also counterclaimed and asked for an order on plaintiff to deliver over the certificates of stock in the Empire Co.

The trial Judge held that plaintiff was a creditor of the Empire Co., and that as such his claim to be paid was not affected by the sale and transfer to the Sun and Hastings Co. The Judge did not decide whether plaintiff had any rights directly against the latter company, which he considered a difficult question. Nor did he determine anything as between plaintiff and the Trusts and Guarantee Co. He made a declaration that plaintiff was not bound by the provisions of the agreement to take permanent stock in the Sun and Hastings Co., nor otherwise prejudiced by the agreement or precluded thereby from taking any steps he might be advised to recover the money alleged to be due to him from the Empire Co. He dismissed the counterclaim and ordered the defendants the loan companies to pay the costs of plaintiff and defendants the Trusts and Guarantee Co.

The first question to be determined is whether plaintiff's status is that of creditor or shareholder. Upon this . . . plaintiff's right to maintain this action substantially depends. If he is a creditor, his rights are plain. But, if he is a shareholder, then . . . different considerations apply.

The provisions of the Loan Companies Act, the by-laws of the company, and the words of the certificates on which plaintiff bases his claim, must be considered.

The Empire Co. was a company having authority to raise a fund or stock by means of terminating shares under sec. 10 of the Loan Corporations Act, which enables such a company to issue terminating shares of one or more denominations, either fully paid or preferred stock or to be paid by periodical or other subscriptions, and to "repay such funds when no longer required for the purposes of the corporation." Article VII. of the by-laws of the Empire Co. deals with the capital stock. After declaring the amount of the authorized capital stock, and providing for its division into two distinct kinds, viz.: first, terminating or withdraw-

able stock, which may be of three kinds, i.e., instalment, prepaid, or fully paid dividend bearing; and second, permanent or non-withdrawable stock, which may be of two kinds, i.e., instalment or subject to call: it provides (secs. 7 and 7 (a)) with reference to prepaid terminating stock (shortly described as class E.): Persons desiring to take this class of stock do so by paying at issue \$50 per share. They are to receive out of the profits earned and available for dividend a semi-annual dividend not exceeding 6 per cent. per annum on the said sum of \$50 per share, and the balance of profits, if any, earned by such stock "shall until the maturity of the stock be carried to the credit of the stock after it is charged with the annual deduction for expenses in this section mentioned." The deduction for expenses may for the first year, in the discretion of the directors, equal but not exceed 5 per cent. of the maturity value of the shares and $1\frac{1}{2}$ per cent. of the maturity value for each subsequent year until maturity. Any terminating shares not borrowed against shall be deemed to mature when the payments made to the loan fund of the company on the share, together with the profits standing to the credit of the share, amount to . . . \$100.

The 4 first mentioned certificates set out in paragraph 2 of the statement of claim, viz., No. E. 042, No. E. 066, No. E. 070, and No. E. 086, and the certificate referred to in paragraph 3 of the statement of claim, represent terminating prepaid stock issued under the foregoing by-laws, and none of them had matured at the date of the commencement of the action.

Section 8 of art. VII. of the by-laws provides for the issue of fully paid dividend bearing stock. This stock is sold at \$100 per share, and a semi-annual dividend is to be paid on it, at a rate agreed upon in writing between the company and the holder when application is made, and the said \$100 per share is to be returned to the holder at the end of the period for which the stock is issued, such period not to be less than one year and not more than 5 years from the date of issue, such term to be agreed upon when application for the stock is made. No further profits than the dividend agreed upon are to be paid to the holder of this class of stock. Under the certificate last set forth in paragraph 2 of the statement of claim, plaintiff is the holder of two shares of this class, equal to \$200, and, by the terms of

the certificate, dividends at the rate of 6 per cent. per annum are payable out of the profits earned semi-annually until 2nd June, 1904, when dividends cease, and . . . \$200 may then be withdrawn upon surrender of the certificate.

Although these two shares appear to partake more of the character of an advance or loan than the other shares, yet it cannot be said that, even in respect of them, plaintiff was a creditor in the ordinary sense of that term. The moneys were not advanced as a loan pure and simple, and it is doubtful if the company had any power to obtain loans of that description. The object and purpose of the formation of companies of the character of the Empire Co. seem opposed to dealings of that kind: see secs. 28 to 39, inclusive, of the Loan Corporations Act.

Plaintiff was not a depositor with the company or a purchaser of loan debentures issued by it, in pursuance of or in accordance with its powers.

There is nothing to place him on an equal footing with the ordinary creditors such as depositors or holders of debentures. Even in respect of these two shares, the highest right he would have at any time would be to withdraw his money at the expiration of the time stated in the certificate. He would then be entitled to a priority as against the other shareholders if the company was still a going concern.

His position is not dissimilar to that of a holder of terminating shares who has given notice of intention to withdraw under by-laws permitting him to do so. ' . . .

[Reference to *Sibun v. Pearce*, 44 Ch. D. 354, 371; *Walton v. Edge*, 10 App. Cas. 33.]

As regards the other shares, a fortiori plaintiff is not an ordinary creditor. If he could ever attain the position described by Lindley, L.J., in *Sibun v. Pearce*, at p. 371, it would not be until the time for withdrawal had arrived, and he had given notice of intention to withdraw, or the company, without having done so, exercised its right to retire the shares under sec. 13 of the Loan Companies Act. That section enacts that when any terminating shares have been fully paid up according to the by-laws, or have become due or payable to the holder thereof, then and in such case the holder may withdraw the amount, or may, with the consent of the corporation, convert the amount into permanent shares

or stock of the corporation; and if, after notice to a shareholder that terminating shares standing in his name have matured and become due or payable to him, the shareholder neglects for 3 months to draw the amount, the directors may, at their option, convert them into permanent shares. Sections 11 and 12, as well as other parts of the Act, seem inconsistent with the notion that the holding of shares such as represented by the certificates held by plaintiff constitutes the holder a creditor. In respect of them he is a member of the corporation, and so remains until he has . . . "been paid out."

Neither when the agreement of sale and transfer to the Sun and Hastings Co. was finally consummated, nor at the commencement of this action, did plaintiff occupy a position other than that of shareholder, and as such his rights must be measured in this action.

Beyond question, the effect of what has been done is to work a most material and important change in plaintiff's position. But the legislation enables it to be done. The Loan Corporations Act authorizes a sale and purchase of the assets of the one company by the other, and the making of an agreement to that end: secs. 40 and 41, as amended by 3 Edw. VII. ch. 16, sec. 4 (1). The amendment makes an important change in the former law. It provides that in any agreement under the Act for the purchase and sale of assets the consideration may consist in whole or in part of fully paid shares of the permanent capital stock of the purchasing corporation. Provision is made for submitting the agreement to a vote of the shareholders and obtaining the sanction and assent of the Lieutenant-Governor in council, and for registration of the agreement when finally consummated: sec. 42, as amended by 3 Edw. VII. ch. 16, sec. 4 (3); secs. 43, 44, 45, 46 (as substituted by 63 Vict. ch. 27, sec. 8), 47, and 48.

In this instance the companies have availed themselves of the provisions enabling the purchasing company to pay the consideration in fully paid up shares of its permanent capital stock. The agreement contains a provision to that effect, and provides for the distribution of the permanent shares among the shareholders of the Empire Co. The Sun and Hastings Co. has provided and allotted the shares in accordance with the agreement, and plaintiff's position has been changed from a holder of shares subject to withdrawal

in the Empire Co. to that of a holder of permanent shares in the Sun and Hastings Co. But this transition of his rights has been accomplished by the votes of the shareholders and by virtue of legislation which allows it. And as a shareholder he appears to be bound by what has been done. It may, perhaps, afford no consolation to plaintiff to say that the evidence seems to shew that, having regard to the position and circumstances of the Empire Co., the sale appears to have been an advantageous one, but whether or not it was so cannot affect the merits. It was one authorized by the Act both as to its nature and extent and the consideration to be paid and received.

Some stress was laid . . . upon the 12th clause of the agreement, which, it was argued, preserved to holders of certificates of stock certified by the Trusts and Guarantee Co. some rights against the securities in the hands of that company; but it seems manifest that it was only intended for the protection of that company by placing on the Empire Co. the burden of procuring the handing over or release of the certificates or indemnifying the Trusts and Guarantee Co. against any demands or actions such as the present. . . .

Appeal allowed and action dismissed with costs throughout.

The judgment as regards the counterclaim was not complained of.

OSLER, J.A., gave reasons in writing for the same conclusion.

GARROW, J.A., also concurred.

JUNE 29TH, 1906.

C. A.

KEILLER v. JOHN INGLIS CO.

Master and Servant—Injury to Servant—Negligence of Master—Defective Scaffolding—Liability at Common Law—Workmen's Compensation Act—Want of Inspection.

Appeal by plaintiff from judgment of a Divisional Court (6 O. W. R. 334), allowing appeal from judgment of ANG-

LIN, J., and directing judgment for defendants as of non-suit. Plaintiff was a boilermaker in the employ of defendants, and while engaged at the boiler house of the Toronto Railway Company he assisted in erecting a scaffold, through which, some six weeks later, he fell, receiving serious injuries, for which the jury assessed damages at \$1,500.

G. F. Shepley, K.C., for plaintiff.

E. E. A. DuVernet and R. H. Greer, for defendants.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, J.J.A., CLUTE, J.), was delivered by

OSLER, J.A.:—There was, in my opinion, no evidence at the trial which would support a verdict for plaintiff either at common law or under the Workmen's Compensation Act.

As regards the first, the jury found that the negligence consisted in not sending competent men to erect the scaffold. It appeared that the men usually employed for that purpose were for some reason not available, and that plaintiff was told by the foreman of the shop to do the best he could, and that on applying to the president of the defendant company he was told to take the lumber for the scaffold from a pile in the yard, which contained an abundant quantity of good sound material proper and sufficient for the purpose. Plaintiff undertook the job without demur. It seems to have been a simple one, and the scaffold was made by the person whom plaintiff instructed to do it properly and securely in all respects but one, viz., that one of the planks of the flooring was weak and defective by reason of a large knot in the middle and the grain of the wood running cross to the edges of the plank. This plank, with others, had been taken by plaintiff from the pile in the yard, apparently without the least attempt to examine it, his only excuse being that there was ice and snow on the planks, which would make examination difficult, and anyway he was no judge of lumber. There is, however, neither evidence nor finding that either the foreman or the president knew that plaintiff was not competent to build such a scaffold either as regards its construction or the selection of the materials, and that, I think, is a conclusive answer to the contention that there was negligence on the part of the employers as at common law: *Gallagher v. Piper*, 16 C. B. N. S. 669, 688.

Then as to the Workmen's Compensation Act. The jury made no findings, nor were they asked to make any, which would establish a cause of action under the Act, but the learned Judge, on motion for judgment, assumed to make the supplementary findings that the foreman ordered the construction of the scaffold; that he was a person to whose orders and directions plaintiff was bound to conform and did conform; and that it was because of the conforming to such orders that the accident took place. Here again the case falls short of proving negligence on the part of the foreman. He had nothing to do with the direction given by the president as to where the material for the construction of the scaffold was to be obtained, but I do not see how any negligence can be attributed to him because of the order he gave to plaintiff, unless (which was not proved) he had reason to believe that plaintiff was not competent to perform it, and that the order might therefore lead him into danger. The supplementary findings of the learned Judge, assuming, but with all respect not agreeing, that he was, on the evidence, at liberty to make them, therefore carry the case no further. Neither do I think that they are supported by the evidence, because plaintiff, instead of performing the order himself, or overseeing its performance, intrusted its execution entirely to others to whom the foreman had not intrusted it, and he therefore cannot say that he was conforming to the order of the foreman and that his injury resulted from his having so conformed. The foreman may well have been content to intrust the duty to plaintiff himself, an intelligent workman accustomed to the appearance of and to working upon scaffolds, and for whose own use the scaffold in question was designed and constructed, but it would be extending the liability of defendants beyond reason to hold them responsible for the carelessness or ignorance of others upon whom plaintiff chose to devolve the performance of the duty which he had himself undertaken, and which, so far as anything to the contrary is shewn, he might have competently performed had he himself done or supervised it.

It was much pressed . . . that there was negligence by reason of the absence of inspection . . . This contention is a mere tabula in naufragio, and more defective than the others. No case of that kind was made in the pleadings or on the evidence, and a new trial ought not to be granted, on mere suggestion, for the purpose of setting it up.

I am unable to see any error in the judgment complained of, and, for the above reasons, would dismiss the appeal.

JUNE 29TH, 1906.

C.A.

REX v. DAUN.

Criminal Law—Seduction of Girl and Illicit Connection under Promise of Marriage—Election of Prisoner as to Trial—Amendment of Information as to Date of Offence—Prisoner Compelled to Re-elect—Corroboration—Material Particulars—Implication of Prisoner.

Crown case reserved by the Judge of the District Court of Thunder Bay upon the indictment and conviction of the prisoner for having under promise of marriage seduced and had illicit connection with one Annie Melina Bates, a woman under 21, of previously chaste character, contrary to sec. 182 of the Criminal Code. The two questions reserved were: (1) whether upon the evidence there was sufficient corroboration of the complainant's testimony to satisfy sec. 684, sub-sec. (c), of the Criminal Code; and (2) whether the Judge had power to allow the district attorney to prefer an indictment for an offence committed on 25th March, 1905, and to have the prisoner elect to be tried on that charge, he having previously elected to be tried on the charge that the offence had been committed in October, 1905.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

T. D. Delamere, K.C., for the prisoner.

J. R. Cartwright, K.C., for the Crown.

MACLAREN, J.A.:— . . . When defendant was first brought before the Judge, the date of the offence was, owing to a misconception of the complainant's evidence, laid in the indictment as being in the month of October, 1905. On this charge he elected to be tried before the Judge without a jury. When the day fixed for the trial arrived, the district attorney had learned that the date of the offence should have

been laid as 25th March, 1905, and obtained leave to so amend the charge. Counsel for the accused contended that the amendment could not be made. The Judge held that it could be made under sec. 773 of the Code, but promised to reserve a case on that point. Subject to his objection, the accused elected to be tried by the Judge without a jury. After hearing the evidence, the Judge found the accused guilty on the amended charge; but reserved . . . a further question as to whether there was the corroborative evidence required by sec. 684 of the Criminal Code. . . .

As to the second of the questions (the amendment and new election), it was conceded . . . that, in view of the decision of this Court in *Rex v. Lacelle*, 11 O. L. R. 74, 6 O. W. R. 911, the prisoner could not ask for a negative answer to this question.

The first question, however, presents considerable difficulty. We have to interpret and apply sec. 684 of the Criminal Code, which reads as follows: "No person accused of an offence under any one of the hereinafter mentioned sections shall be convicted upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused: . . . (c) Offences under part XIII., sections 181 to 190 inclusive."

Section 182, under which the accused was charged, reads as follows: "Every one, above the age of 21 years, is guilty of an indictable offence and liable to two years' imprisonment, who, under promise of marriage, seduces and has illicit connection with any unmarried female of previously chaste character and under 21 years of age."

It is to be observed that under the first question reserved for us the sole point we have to consider is the question of law, whether, under the summary of the evidence as given to us by the District Judge, the complainant is corroborated in some material particular implicating the accused. No question is reserved for us regarding the testimony of the complainant or its sufficiency, save as to whether there is such corroboration of it as is required by sec. 684. . . .

According to the testimony of the complainant, the seduction and first illicit connection took place about 25th March, 1905, and a second connection, from which pregnancy resulted, took place about 25th October, 1905.

The summary of the evidence given in corroboration of the complainant is set out as follows in the stated case: "In January, 1906, she was ill with typhoid fever, and the doctor being called in discovered that she was pregnant and had been so for between 4 and 5 months. She then told the doctor and her mother that the prisoner was the father of her child. This was about the last Friday in January, 1906. That night the mother accused the prisoner. He did not deny it, but said there were others. On the next following Sunday the prisoner said to the father and mother of the girl, who was also present, that he always intended to marry her, and a date was then fixed for the wedding. He knew the condition she was in. Her brother was then ill with typhoid fever in the same house, and the prisoner took the girl up to the brother's room and talked of the intended marriage. The prisoner and the brother had worked together in the round house at Fort William prior to 15th January, 1905, and this brother, William Bates, testified that whilst so working there the prisoner told him that he was fond enough or thought enough of Annie to make her his wife; and that upon a subsequent occasion, the date not being fixed, the prisoner asked William Bates how he would like him for a brother-in-law. The prisoner and the girl, Annie M. Bates, had their photograph taken together on the 5th day of February, 1905, and this is produced and put in as corroborative evidence that he had promised to marry her."

I am of opinion that the foregoing evidence is quite sufficient to satisfy the requirements of sec. 684. Full corroboration is not required. The complainant only needs to be "corroborated in some material particular by evidence implicating the accused." There can be no doubt about the above evidence implicating the accused. It points directly to him and to him alone. And I am equally of opinion that it corroborates the complainant not only in a material particular, but in material particulars. It has been laid down that where there are several issues, and the statute requires "corroboration by some material evidence," it does not mean corroboration on each issue: *Parker v. Parker*, 32 C. P. 113. What is required is corroboration in some material respect that will fortify and strengthen the credibility of the main witness and justify the evidence being accepted and acted upon if it is believed and is sufficient. The corroboration

required is not unlike that required in the case of accomplices. . . .

[Reference to Regina v. Boyes, 1 B. & S. at p. 320; Regina v. Piercy, 19 L. T. 238; Cole v. Manning, 2 Q. B. D. 611; Bessela v. Stern, 2 C. P. D. 265.]

I am consequently of the opinion that the first question should also be answered in the affirmative.

MOSS, C.J.O., GARROW and MEREDITH, JJ.A., concurred.

OSLER, J.A., dissented, giving reasons in writing. He held that there was no corroboration of the girl's story as to the connection in March, and that there was no seduction in fact, within the meaning of the statute.

JUNE 29TH, 1906.

C. A.

FINLAY v. RITCHIE.

Contract—Construction—Sale of Shares in Company—Terms of Payment—Instalments—Agreement under Seal—Absence of Covenant or Promise to Pay for Shares—Refusal of Court to Imply Obligation to Pay—Provision for Forfeiture of Down Payment on Default in Subsequent Payments—Mere Option of Purchase.

Appeal by plaintiff from order of a Divisional Court (22nd January, 1906), dismissing plaintiff's appeal from judgment of MEREDITH, J., at the trial, dismissing the action and counterclaim without costs. The action was brought by Edward Finlay, a paper manufacturer residing at Georgetown, against Fred. A. Ritchie, a merchant residing at Toronto, to recover \$845.55 alleged to be due by virtue of an agreement under seal for the sale by plaintiff to defendant of 302 shares in the Kinleith Paper Co. The agreement was in writing, and \$500 was paid under it by defendant. It did not contain any covenant or promise on the part of defendant to pay for the shares. The trial Judge and the Divisional Court construed the document as giving the defendant the right to acquire the shares upon making certain payments, but not as obliging him to make the payments.

W. Nesbitt, K.C., and G. H. Kilmer, for plaintiff.

G. H. Watson, K.C., for defendant.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, J.J.A., BRITTON, J.), was delivered by

BRITTON, J.:—The agreement between the parties made on 11th August, 1903, recites that plaintiff was the owner of 302 fully paid up shares of the common stock of the Kinleith Paper Company, Limited, each of said shares of the par value of \$100, and that plaintiff had agreed to sell these shares to defendant for the consideration therein named, and subject to the terms therein expressed. "Terms" in contracts "are conditions, propositions stated or promises made, which, when assented to or accepted by another, settle the contract and bind the parties:" see Imperial Dictionary.

The whole document must be looked at, to see what its terms are, and these are as follows:—

1. That plaintiff should deposit the certificates for these 302 shares, indorsed in blank, in the Bank of Nova Scotia, Toronto branch, to be delivered to defendant upon payment by defendant (and only upon such payment) of the full sum of \$18,120 (\$60 a share for the 302 shares) and interest at 6 per cent., such payment to be made (if made) as set out in the agreement.

2. That defendant should, upon that deposit of certificates being made, pay to plaintiff \$500; and defendant expressly agreed to make the payment.

3. That defendant should have the right to pay the further sum of \$500 on 11th November, 1903, \$83.33 on the 15th day of each month of the 12 months next ensuing, first payment on 15th September, 1903; \$125 for each of the next ensuing 24 months; and the remainder with interest on 11th August, 1906.

4. That defendant had the privilege, at any time within the 3 years, of paying in full.

5. That defendant might pay into the Bank of Nova Scotia, Toronto, instead of to plaintiff personally, and that such payment (to the extent of such payment) should be a full discharge to defendant, and upon payment in full the Bank of Nova Scotia should deliver to defendant the certificates of shares, even if plaintiff should be dead or absent from Toronto.

6. That plaintiff should covenant and agree that for 5 years he would not erect in Canada a mill, etc., and that he would not during that time accept certain employment, etc.

7. That if defendant should not pay on the day, or within 5 days from the dates mentioned for payment, all sums theretofore paid by defendant should be absolutely forfeited to plaintiff, and all interest of plaintiff under the agreement should thereupon cease.

This seems to me a perfectly clear and intelligible agreement, although possibly it may not be such an agreement as plaintiff intended to make. . . . It means that defendant had the right to pay for plaintiff's shares and get them, but not to get them unless he paid in full for them. If the stock was good and continued to be good, plaintiff was not hurt. It continued to stand in plaintiff's name upon the books of the company; he could vote upon it, defendant could not. The stock could not be transferred except upon production and surrender of the certificates, and defendant could not get these certificates to produce and surrender until he paid in full. . . . At the expiration of 5 days after default in making payments which defendant had the right to make, he forfeited to plaintiff all the money he had paid; and then all right to purchase the stock, all interest of defendant under the agreement, ceased. How could that be so, if plaintiff still had the right to collect from defendant in full for the stock at the price named?

The terms of this agreement completely negative the existence of any implied covenant on the part of defendant to pay in any event the full \$60 and interest for each share of the stock; and these terms prevent there being read into the agreement what has been called in an agreement for sale an express covenant on the part of the purchaser to pay. Defendant is not a purchaser in fact. This interpretation is consistent with the whole agreement, and explains why the language is that plaintiff gives to defendant the right to pay. . . . If plaintiff's contention is correct, one would naturally look for a clause allowing defendant upon payment of a large part of the purchase price to get a part of the certificates, so that he could use or sell the shares withdrawn.

The agreement must be looked at as a whole: see *Montreal Street R. W. Co. v. City of Montreal*, [1906] A. C. 100.

It may be that plaintiff did not get enough in getting \$500 as a consideration for his covenant not to go into business. Evidence of that and of other things not within the 4 corners of the agreement itself, was excluded. Putting myself, as far

as I am able, in the position of the parties to this agreement, I cannot say that there is anything unnatural or irrational about it. I can quite understand that plaintiff might be willing so to covenant upon getting \$500, and to further agree to give to defendant the option to buy all his shares on the terms named. Plaintiff might reasonably expect that the \$500 due 1st September would be paid in addition to the monthly instalments, so that, if defendant paid no more, plaintiff might reasonably suppose he would profit by the transaction.

This further view of the case presents itself. Even if there was the express covenant on the part of defendant to purchase, the forfeiture of all money paid, and the abandonment of any right to the shares in case of default, must be assumed, as against plaintiff, as the damages, or in lieu of damages, for such default.

If there is any covenant to be implied against defendant, it is that he would either pay in full, or in the event of paying in part he would make no claim either to the shares or to any money paid by him. If the covenant were in the alternative, it would be satisfied by defendant losing his money—plaintiff holding all his shares. The declaring the money forfeited and making no claim to the shares is nothing more than a settlement between the parties if defendant defaults or elects to abandon the shares and to lose any money paid on account of them.

Appeal dismissed with costs.

JUNE 29TH, 1906.

C.A.

CITY OF TORONTO v. TORONTO R. W. CO.

Street Railways — Agreement with Municipality — Establishment of New Lines—Territory Annexed to Municipality Subsequent to Agreement—Places for Stopping Cars—City Engineer—Judicial Powers — Notice—Determination—Recommendation—Approval of Council — Resolution instead of By-law.

Appeal by defendants from judgment of STREET, J., 6 O. W. R. 871, 11 O. L. R. 103.

W. Laidlaw, K.C., and W. Nesbitt, K.C., for appellants.

J. S. Fullerton, K.C., and W. Johnston, for plaintiffs.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, J.J.A.), was delivered by

OSLER, J.A.:—The case involves the construction in two particulars of the agreement of 1st September, 1895, between plaintiffs and George W. Kiely et al., set forth as a schedule to 55 Vict. ch. 99 (O.), under which defendants are operating their railway.

The first question is, whether, under sec. 14 of the award, conditions, tender, and by-law referred to and incorporated in the agreement, defendants can be required by plaintiffs to establish and lay down new lines and extend their tracks and car service on and into territory which was not within the limits of the city at the date of the agreement, but which has since been annexed to and is now part of the city and within its enlarged and extended limits.

The question was recently before this Court on appeal from the judgment of Anglin, J. (9 O. L. R. 333, 4 O. W. R. 330, 446), on a special case submitted in another action between the parties, but was not argued because it was considered that it had already been practically disposed of adversely to defendant by our decision in a still earlier action between them, reported 5 O. W. R. 130, which was afterwards affirmed by the Judicial Committee of the Privy Council. The judgment upon the special case on that point was, therefore, affirmed by us (10 O. L. R. 657, 6 O. W. R. 677), and Street, J., in holding in the present action that defendants were bound by the agreement to extend and lay down their tracks and to operate their railway within the added or extended territory, when required by plaintiffs so to do, merely followed that decision. But, inasmuch as the judgment of this Court on the special case has in this respect now been reversed by the Supreme Court of Canada (26 C. L. T. Occ. N. 454), distinguishing it from the earlier decisions, it follows that the appeal from so much of the judgment of Street, J., as declares the obligation of defendants to be what we held it to be, must be allowed, and that for the 2nd, 3rd, and 4th clauses of the judgment as drawn up must be substituted a declaration that defendants were not bound to comply with by-law No. 4520, passed by defendants on 10th April, 1905, and were not bound to lay down railway tracks on Avenue road, as required by that by-law, and have not

committed a breach of sec. 14 of the award, conditions, tender, and by-law mentioned in the 2nd paragraph of the statement of claim, in that respect.

The other question is, whether, under the terms of the agreement, the power to make regulations to be complied with by defendants in respect of the places at which cars are to be stopped for the purpose of taking on or letting off passengers, rests with defendants or with the city engineer and the council of plaintiffs, and, if with the latter, whether the regulation now sought to be enforced was made in accordance with the agreement.

The relative clauses of the award, conditions, tender, and by-law on this point are as follows:—

26. The speed and service necessary on each main line, part of same, or branch, is to be determined by the city engineer and approved by the city council.

37. Each car is to be in charge of a uniformed conductor, who shall clearly announce the names of cross-streets as the cars reach them. . . .

39. Cars shall only be stopped clear of cross-streets and midway between streets where distance exceeds 600 feet. . .

For many years defendants stopped their cars at all the places mentioned in sec. 39, but, being of opinion that fewer stops were necessary or desirable for the effective working of the railway, recently ceased to stop at many of them. Complaints having been made of the inconvenience caused by this course, the city engineer examined into the matter and reported to the council's committee on works in favour of the restoration of nearly all the former stopping places, as follows: "I beg to recommend that the Toronto Railway Company be requested to stop their cars at the following points. . . ." The several points or places are then specified in detail. The committee sent on the report in the usual way to the board of control; the board . . . passed it on to the council for consideration; and the latter by resolution of 25th April adopted it without amendment.

Defendants were notified to comply with the resolution and to stop their cars as provided thereby. This they refused to do, on various grounds, contending: (1) that if the matter were within the jurisdiction of the engineer at all, he was

acting in a judicial capacity, and could not determine it without first giving notice to them, and hearing their objections; (2) as expressed by Street, J., that the regulation of the places at which cars are to be stopped is not a matter coming within sec. 26, but is left to be determined by defendants themselves, subject only to the restrictions of sec. 39; in other words, that so long as they stop at cross-streets and midway streets between streets only when the distance exceeds 600 feet, they may stop at such points only as they deem advisable; (3) that the city engineer has not "determined" but only "recommended" that defendants should be required to stop their cars at the points in dispute; (4) that the council have not adopted the engineer's report by by-law but by resolution only, and that they could act in this matter only by by-law.

Some of the most serious of these objections have arisen from the singularly careless and slipshod way in which the council have transacted business of a very important nature; but, upon consideration, I am of opinion that we are not compelled to yield to any of them, and that my brother Street's judgment should be affirmed.

Having regard to the tenor of the whole contract, it appears to me that the engineer does not occupy any judicial or quasi-judicial position between the city and the company in reference to the matters provided for by clause 26. The subject is one which, by the very terms of the clause, the former have retained under their own control, the engineer being the person agreed upon who is to advise them what, in his opinion, is necessary to be done by defendants, though his determination goes for nothing until and unless plaintiffs approve of it. Had the question arisen at the inception of the company's operations, I think it would hardly have occurred to any one to suggest that the engineer was bound to consult with them before determining what service should be supplied. There is nothing to indicate that anything of that kind was in contemplation, and it can make no difference in the rights of the parties and the construction of the contract that what the engineer has now required to be done is something different from what defendants had adopted. The reference of a dispute is not what is contemplated. The agreement says nothing about hearing and determining. On the contrary, the engineer is a person selected by the parties as one upon whose skill and judgment they

could rely, and who from his general qualifications would be capable of determining what should be done by defendants in this as well as in other matters to the performance of which defendants have obliged themselves, upon the adoption by the council of his recommendation, or requisition, or determination. There is no substantial distinction between his "recommendation" in clauses 11 and 12, his "requisition" in clause 24, and his "determination" in clauses 26, 27, 28. None of these is effective without the approval of the council, and equally, I think, none of them legally compels, though they may morally or reasonably invite, discussion or consideration between the engineer and defendants before he refers them to the council. . . .

[Reference to *Wadsworth v. Smith*, L. R. 6 Q. B. 332, 337.]

2. Subject to the limitation of clause 39, the regulation of the places at which cars are to be stopped seems to me to be a matter within the "speed and service" clause. Subject to such limitation, therefore, plaintiffs had the power, in the manner prescribed by the latter clause, to fix such places. I refer to what was said on this point in the former case between the parties, reported 10 O. L. R. 657, 662-4 (C.A.)

3. I think that the report of the engineer to the council "recommending" that defendants be "requested," and setting forth a list of the points and places at which "they shall be required" to stop their cars, though somewhat informally expressed, is a sufficient "determination" by him of what defendants were to do in this respect. It was more than a mere mental determination. It was his official action, and the only official action he could take to express his determination of what defendants should do. . . . He could not recommend without having first determined, and his recommendation and the language of the report shew that this is what he has done. Nothing further was necessary except for the council to approve of the report, and when they had done so, and the report and approval were communicated to defendants, as they were, it became defendants' duty, under their covenant in the agreement, to comply with what was required.

4. Then, have plaintiffs approved of their engineer's determination? They have done so by resolution, and, though I cannot say that I am entirely free from doubt, I incline to

the opinion that this was sufficient, and that a by-law was not necessary, and that the case is not governed by secs. 325 and 326 of the Municipal Act. Defendants were not exercising powers under that Act. The matter was one dependent upon the contract of the parties, and where a by-law is required as under clause 14, it is so expressed. The action of the council upon the engineer's report in other matters intrusted to his determination is elsewhere variously expressed as "approval," "confirmation," or "indorsation." The thing which becomes operative is the engineer's determination, and the approval of the council may, I think, be manifested by a resolution adopting it. The decision of this Court in *Port Arthur High School Board v. Town of Fort William*, 25 A. R. 522, warrants us in so holding. And see *Lewis v. Alexander*, 24 S. C. R. 551, 558. The case is not within the decision of the Supreme Court of Canada in *Liverpool and Milton R. W. Co. v. Town of Liverpool*, 33 S. C. R. 180. . . .

5. Lastly, I am of opinion that plaintiffs are entitled to an order restraining defendants from running the cars upon their railway except in accordance with the determination of the engineer as to the stopping places. They have covenanted to do so, and there is, in the circumstances of the case, no greater difficulty in enjoining them from committing a breach of their covenant than there was in *City of Hamilton v. Hamilton Street R. W. Co.*, 10 O. L. R. 594, 6 O. W. R. 207, recently before us. I refer to the cases there cited at p. 599 and to . . . *Wolverhampton v. Emmons*, [1901] 1 Q. B. 515, 522-3.

Appeal dismissed with costs.

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JUNE 29TH, 1906.

C.A.

CLARKE v. LONDON STREET R. W. CO.

*Damages—Quantum—Personal Injuries of Married Woman
—Negligence of Street Railway Company—Expenses Incurred by Husband—Excessive Verdict—New Trial.*

Appeal by defendants from judgment of MEREDITH, C.J., at the trial, upon the findings of a jury, in favour of plaintiff Frances Clarke for \$1,000 damages and of plaintiff John Clarke, her husband, for \$1,200 damages, in an action for injuries sustained by the wife owing to the negligence of defendants, as alleged, and for expenses and loss incurred by the husband in consequence.

The appeal was confined to the ground that the damages were excessive.

I. F. Hellmuth, K.C., and C. H. Ivey, London, for defendants.

J. F. Faulds, London, for plaintiffs.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.), was delivered by

OSLER, J.A.:— . . . The action was originally brought by plaintiff Frances Clarke alone to recover damages for injuries sustained by reason of the alleged negligence of defendants.

The case made by her at the trial was, that she was getting on defendants' car as a passenger, and while in the act of

passing from the lower to the upper step, the car was suddenly started and she was swung off and thrown to the ground. The result was that her right arm was badly broken in 3 places, her shoulder severely and her knee slightly hurt. She suffered great pain, was in the doctor's hands for several months, and the arm and hand are not likely ever to be again as useful as they were before the accident.

After counsel had addressed the jury at the close of the case, the Court suggested that it might be well that plaintiff's husband should be joined as co-plaintiff to avoid any difficulty as to the wife's right to recover damages for the expenses incurred in respect of the employment of a nurse during her illness and for the doctor's charges, etc., and by consent, and to avoid further litigation about these and any other possible claims the husband might have, it was agreed that he should be, and he accordingly was, added as a co-plaintiff.

The appeal from the judgment in favour of the wife is answered, in my opinion, by the recital of the injuries she appears to have suffered. It may be said, perhaps, considering her age, that the amount of the verdict is liberal, yet no one can say that it is extravagant or more than a jury acting reasonably might, under all the circumstances, properly allow.

The husband's case stands in a different position. He sustained no personal injury, but has had a verdict \$200 larger than that given to the wife. Apparently he had no thought of suing for himself, the expectation evidently being that the expenses he had been put to or would incur in the future would be recoverable in the wife's suit. He is entitled to recover medical expenses, some \$110; whatever might be thought reasonable to pay his daughter for her services as a nurse, and for which what appears to be an extravagant charge was suggested; and also, having regard to the ages of the parties and their position in life, a reasonable sum for the occasional services, should it be thought they would be necessary, of some one to assist his wife in the housework. It may be properly said that in respect of all these matters there was no evidence to justify a verdict for anything like such a sum as \$1,200.

The appeal as to the wife's judgment is, therefore, dismissed with costs.

As to the husband, the finding and judgment in his favour must be set aside and a new assessment of damages directed;

the costs of so much of the appeal as relates to him being costs to defendants in any event. But if the husband plaintiff is willing to accept \$400, which has been already offered by defendants, and the latter are still prepared to pay that sum, the judgment may be entered accordingly, and in that case this branch of the appeal will also be dismissed with costs.

JUNE 29TH, 1906.

C.A.

ONTARIO BANK v. O'REILLY.

Warehouse Receipts — Partnership — Banks and Banking — Fraud — Misrepresentations — Bank Act — Liability of Partners — Bankruptcy and Insolvency — Promissory Notes — Extinguishment of Debt — Securities — Release — Bona Fides.

Appeal by plaintiffs from judgment of MEREDITH, J., at the trial, dismissing the action.

Plaintiffs' claim was to recover from defendants, or some of them, as members of a partnership carrying on at Ottawa the business of warehousemen, under the name of "The Ottawa Cold Storage and Freezing Co.," the value of a large quantity of eggs, butter, and cheese.

The statement of claim alleged, in substance, that defendants the Ottawa Cold Storage and Freezing Co. issued certain warehouse receipts to defendant James A. MacCullough, whereby they acknowledged the receipt on his account of the goods mentioned in the receipts, and acknowledged the value of the goods to be in the aggregate \$39,715; that MacCullough assigned and indorsed the warehouse receipts to plaintiffs, in consideration of moneys lent and advanced to the amount of \$33,452.30, including interest; that plaintiffs duly demanded the delivery of the goods, but, except to the extent of \$5,383.03, defendants neglected and refused to deliver the same; that (in the alternative) the defendant company, when the warehouse receipts were offered to plaintiffs by way of security for the advances, falsely and fraudulently represented that the quantity of goods mentioned in

them had in fact been received in store in the warehouse, and in consequence plaintiffs were induced to make the advances, but the goods were never in fact received in store, and plaintiffs suffered damage to the extent of \$33,542.30. Plaintiffs claimed payment of this sum with interest to judgment.

Defendant Frank O'Reilly denied that he was a partner in the firm of the Ottawa Cold Storage and Freezing Co., alleged that plaintiffs had agreed not to attempt to hold him as a partner in that company in respect of certain promissory notes upon which plaintiffs were then suing; and further that if the warehouse receipts were given, they were collateral to the promissory notes; and he pleaded the Statute of Limitations.

Defendant George O'Reilly denied the allegations of the statement of claim, and set up that if documents purporting to be warehouse receipts were given, they did not comply with the provisions of the Bank Act, and were not proper warehouse receipts, but were illegal, invalid, and void, and passed no title in the goods to plaintiffs. He also pleaded the Statute of Limitations, but nothing turned on this.

The trial Judge held that defendant Anthony O'Reilly was not a member of the partnership known as the Ottawa Cold Storage and Freezing Co., and plaintiffs acquiesced in that. Defendant MacCullough was not charged as liable on the warehouse receipts.

The action was dismissed as against all the defendants, and plaintiffs appealed as against defendants Frank and George O'Reilly.

A. B. Aylesworth, K.C., and Glyn Osler, Ottawa, for plaintiffs.

H. M. Mowat, K.C., for defendant George O'Reilly.

G. F. Henderson, Ottawa, for defendant Frank O'Reilly.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, JJ.A.), was delivered by

MOSS, C.J.O.:—It appeared that in the early part of 1898 defendants Frank and George O'Reilly were engaged in a storage business in the city of Ottawa. They contemplated extending the business into two branches to be carried on in separate parts of the same building. One branch was to consist of the business of commission merchants, buying and

selling eggs, butter, and other farm produce. The other branch was to continue as a cold storage and warehouse business. In April, 1898, as the result of negotiations between defendants Frank O'Reilly, George O'Reilly, and James A. MacCullough, the latter, who had been engaged in business in Montreal, became a partner in the commission and produce business, and thereafter until July, 1900, when both businesses failed, the two branches were carried on as separate and distinct businesses. Defendant MacCullough had no interest in the storage or warehouse business. There were separate books of account for the commission and produce business, in which he was a partner, in which any moneys that happened to be received on account of the storage business were credited to defendant George O'Reilly, who received them on behalf of the storage business. It is much in dispute whether defendant Frank O'Reilly was a partner in the commission and produce business. MacCullough asserts that the arrangement for the partnership with him was that the profits were to be divided, 50 per cent. to him and the other 50 per cent. between defendants Frank and George O'Reilly. On the other hand, the two latter contend that defendant Frank O'Reilly was not a partner in either branch of the business. It is very probable that he was a partner or financially interested in both branches, but, at all events, the evidence supports the finding of the trial Judge that he was a partner in the storage and warehouse branch of the business, in which, according to his statements to MacCullough when he was inducing him to go into the commission and produce branch of the business, he was a partner from the first.

While MacCullough was a partner in the commission and produce branch, the firm account was kept at plaintiffs' bank. The course of dealing was that, for the purpose of enabling the partnership to purchase the produce in which they were dealing, plaintiffs gave them a line of credit in the form of an overdraft on their account. From time to time plaintiffs discounted their promissory notes, the proceeds of which were placed to the credit of the account. The goods purchased by them were warehoused with the storage branch of the business, and receipts signed in the name of the Ottawa Cold Storage and Freezing Co. by defendant George O'Reilly were given to defendant MacCullough on behalf of the commission and produce business. These warehouse re-

ceipts were from time to time indorsed over to and hypothecated with plaintiffs as promissory notes were discounted. The method adopted was that the warehouse receipts were indorsed to plaintiffs by defendant MacCullough, and contemporaneously a memorandum of hypothecation signed by defendant George O'Reilly, as manager of the commission business, with a certificate of valuation by him, was handed to plaintiffs. The proceeds of the discounts were placed to the credit of the commission and produce business, on behalf of which the dealings with plaintiffs were entered into and carried on. This course of dealing continued from June, 1898, to July, 1900. All the transactions of the years 1898 and 1899 were retired and closed up. The transactions involved in this action extend from 24th April to 30th July, 1900, and are represented by 10 warehouse receipts indorsed and hypothecated as before described, and by 10 promissory notes made on behalf of the commission and produce business to the order of defendant MacCullough and indorsed by him and the defendant George O'Reilly for sums representing in the aggregate \$30,000. In or about the latter part of July, 1900, the business got into difficulties, there were dissensions between the partners, and MacCullough retired from the partnership, and shortly afterwards defendant George O'Reilly left Ottawa. These facts were communicated by defendant Frank O'Reilly to plaintiffs' manager, who thereupon went to the warehouse, and on checking the goods in store ascertained that there was a large discrepancy between them and the amounts specified in the warehouse receipts. Accordingly he assumed possession, appointing one Lewis, the man who had been in charge, to continue in charge for plaintiffs. Subsequently defendant George O'Reilly was induced to return, and he took charge for plaintiffs. In the end something like \$4,700 was realized from the goods in store, the remainder being unaccounted for. After plaintiffs took possession, the Merchants Bank of Halifax, which had obtained a judgment against the Ottawa Cold Storage and Freezing Company, issued execution thereon and seized the goods in the warehouse, and, upon plaintiffs claiming them, interpleader proceedings were taken. While these were pending plaintiffs were desirous of procuring the testimony of defendant Frank O'Reilly. He expressed his reluctance to testify lest he should complicate himself with the Merchants Bank of Halifax, i

it appeared that he was liable to plaintiffs upon the promissory notes. And in order to remove this difficulty, and, as plaintiffs' manager testified, being assured by defendant George O'Reilly that the two businesses were separate and distinct, and not being sure whether defendant Frank was interested in the commission business or not, he caused a letter to be written by the plaintiffs' solicitors to defendant Frank O'Reilly's solicitor as follows:

"Ottawa, Dec. 15th, 1900.

"M. J. Gorman, Esq., Barrister, &c., Ottawa.

"Re Ottawa Cold Storage.

"Dear Sir,—We are instructed by Mr. Simpson, the manager of the Ontario Bank, that the bank has no evidence that Mr. Frank O'Reilly is a member of the commission partnership known as the Ottawa Cold Storage and Freezing Company, which is liable to the bank upon certain promissory notes to the extent of about \$30,000, and he has authorized us to undertake, as solicitors on behalf of the bank, that the bank will not attempt to hold Mr. Frank O'Reilly liable for the said notes or any of them, as a partner in the said Ottawa Cold Storage and Freezing Company.

"Yours truly,

"O'Gara, Wyld, & Osler."

The interpleader proceedings were afterwards settled between plaintiffs and the Merchants Bank of Halifax—the latter receiving a portion of the proceeds of the goods sold. Plaintiffs, failing to obtain payment of their claim, brought this action on 1st February, 1905.

The trial Judge found that defendant Frank O'Reilly was a partner in both branches of the business, and upon the evidence as developed at the trial there is no good ground for a different conclusion. If that were the sole defence, it would follow that plaintiffs were entitled to judgment as claimed in respect of the warehouse receipts. The Judge did not deal with the defence of the want of validity of the warehouse receipts. But he held that the letter of 15th December, 1900, from plaintiffs' solicitors to defendant Frank O'Reilly's solicitors was the difficulty in plaintiffs' way. He was of opinion that if plaintiffs were willing to take judgment against defendant Frank O'Reilly upon the promissory notes, it should be granted notwithstanding the letter. But, inasmuch as plaintiffs adhered to the letter and did

not seek judgment upon the promissory notes, he considered that he must hold, as he did, that the letter was an absolute unconditional discharge of defendant Frank O'Reilly from the promissory notes, and that his co-defendants, who were liable on the notes, were also discharged, and the warehouse receipts, being only security for the promissory notes, could not be enforced—or, as he expressed it, “the defendants cannot be held liable upon the security which is given for a debt which has been extinguished.” He therefore dismissed the action.

Upon the appeal defendants, besides relying upon the ground taken by the trial Judge, urged strongly that it should not have been found that defendant Frank O'Reilly was a partner in either branch of the business, and that in any case the warehouse receipts were invalid because not given in compliance with the provisions of the Bank Act. It was also urged, apparently for the first time, that there was no sufficient proof that the goods were not in the warehouse at the time of taking possession.

As already stated, the evidence fully sustains the finding of partnership in the storage and warehouse business, if not in the commission and produce business as well.

And there remain only the one question dealt with and the two others not dealt with by the trial Judge, the last not being raised before him nor mentioned in the reasons against the appeal.

Whatever may be the effect in law of the letter, it cannot be said upon the evidence that it was the intention of the parties to extinguish the debt owing to plaintiffs for which the promissory notes were given, or to release or discharge defendants George O'Reilly and James A. MacCullough from liability in respect of it. It is to be borne in mind that according to defendant Frank O'Reilly's evidence his position at the time when the letter was written was that George O'Reilly and MacCullough were the only persons interested in the commission and produce business. And the thought that they were to be discharged would be the most unlikely one to occur to any of the parties. If such has been the result it must be by virtue of the terms of the letter itself.

Does it in terms or by reasonable implication operate to extinguish the debt in respect of which defendant Frank

O'Reilly was probably liable, but in respect of which defendants George O'Reilly and James A. MacCullough were undoubtedly liable? So far from its terms indicating an intention to extinguish the debt, they clearly recognize the continuance of the liability in the other partners in the Ottawa Cold Storage and Freezing Company. The statement is that the bank has no evidence that Mr. Frank O'Reilly is a member of the commission partnership known as the Ottawa Cold Storage and Freezing Company, "which is liable to the bank upon certain promissory notes to the extent of about \$30,000." That is, the partnership is liable, but we have no evidence that Frank O'Reilly is a partner. And because of this the solicitors undertake that the bank will not attempt to hold him liable. There is in this a sufficient reservation of plaintiffs' rights against the partnership, and those who were undoubtedly members of it, to prevent the letter from being treated as having any greater effect than a covenant not to sue. The language affords a strong presumption that the parties were dealing with the liability of defendant Frank O'Reilly, and not with the liability of the other two. The surrounding circumstances already referred to lead to the same conclusion. It is well established that in dealing with a document such as that relied upon in this case, the surrounding circumstances must be regarded. In *Ex p. Good*, *In re Armitage*, 5 Ch. D. 46, which resembles this case in many respects, Sir George Jessel, M.R., said (p. 58): "After all, this is not a release properly so called, that is, a release by deed; it is in form a receipt, and, like all other documents not under seal, it must be construed with reference to the surrounding circumstances, of which there is evidence not contradicted." In *In re Wolmershausen*, 62 L. T. 541, Stirling, J., said (p. 545): "In such a case, however, it has to be determined whether what has occurred amounts to a release, and where, as here, no formal release is given, but what is relied on is an agreement not under seal, then in determining the effect of that agreement, the surrounding circumstances must be regarded."

The circumstances in the case of *Ex p. Good* (*supra*) were stronger in favour of the claim for an absolute release than in this case, for there had been a payment of money by one who was held to be a partner in respect of partnership liabilities, and there was a document in the form of a receipt expressed to be in payment and discharge of a guarantee.

and also of all claims in reference to or in connection with the partnership firm. There was a question whether the released debtor was a partner in fact or an ostensible partner merely, and Bacon, Chief Judge, held that if he was only an ostensible partner his release would not discharge the other partners, a view quite applicable to this case.

In view therefore of the terms of the letter, the nature of the transaction, and the surrounding circumstances, full effect may be given to the letter by confining its operation to the liability of defendant Frank O'Reilly. See also *Dewar v. Sparling*, 18 Gr. 633, particularly at p. 636.

The result is that the debt as security for which the warehouse receipts were given to plaintiffs was not extinguished, and still exists, and plaintiffs are entitled to the benefit of the securities if otherwise valid in their hands.

Defendants, however, contend against their validity—and argue that they were not acquired by plaintiffs in such manner as to pass the property to them or confer a title to the goods—or render the receipts legal securities in their hands.

There can be no doubt that the dealings and transactions through which plaintiffs acquired the warehouse receipts were conducted by them in good faith, and that the intention of the parties was to give to plaintiffs a valid security for the advances which they were making in order to enable the makers of the promissory notes to carry on the commission and produce business. Their account with plaintiffs was an active running account. From time to time they discounted notes, and at the same time indorsed and hypothecated warehouse receipts as collateral security. The proceeds were placed to the credit of the account, and there was no restriction upon the customers drawing cheques or paying out other than the margin established when the account was opened.

In regard to the warehouse receipts now in question, each one was transferred by indorsement and instrument of hypothecation contemporaneously with the discount of a promissory note made by the holders or owners of the warehouse receipts. As a result of each transaction plaintiffs acquired and became the holders of a promissory note, on which the makers were liable, and the latter received in their current account the proceeds of the discount, and in consideration thereof made a transfer or hypothecation of a warehouse receipt. There was therefore a negotiation of a note

and an actual advance at the time of the acquisition of the warehouse receipt. No doubt it was the case that on most occasions when a discount was effected the account was overdrawn, but that was in the course of dealing, and the circumstance did not deprive the transaction of its character of a negotiation of the note, for the proceeds were placed freely at the disposal of the customers, and the drawings on the account continued as before. Therein lies the broad distinction between this case and *Halsted v. Bank of Hamilton*, 27 O. R. 435, affirmed in this Court 24 A. R. 132, and in the Supreme Court, 28 S. C. R. 235, a distinction which renders this case analogous to the decision of the Master of the Rolls in *In re Carew's Estate*, 31 Beav. 39, to which reference is made by the Chief Justice of the Common Pleas in 27 O. R. at p. 439. On the same page the Chief Justice states his reasons for thinking it impossible to treat any of the notes in respect of which the securities in question were given as having been "negotiated," in the sense in which the term is used in sec. 75 of the Bank Act. He says: "It is true that the form was gone through of taking the notes and passing the amount of them to the credit of one of the accounts, but contemporaneously with this an equal amount was placed to the debit of another of the accounts, and not a farthing of the amounts which the notes represented could be attached by Zoellner or made available by him for any purpose, unless he should bring to the defendants and leave for collection or discount customers' paper which would entitle him to credit in account No. 2 for an amount equal to that which he proposed to withdraw."

In other words, the proceeds of the discounts were placed entirely out of the control of the customer, and he could make no use of them except upon further securing the amount of the withdrawals.

No such state of facts exists in this case, and the decision does not assist defendants.

Then it was argued that the warehouse receipts having been given by the Ottawa Cold Storage and Freezing Company, of which defendant George O'Reilly was a member, it was a giving of a warehouse receipt by the firm of its own property to one of its members. But there were two distinct firms. That by which the warehouse receipts were given was not the firm to which they were given, which consisted of the defendants Frank O'Reilly and George O'Reilly and

the defendant James A. MacCullough. He was not a member of the storage and warehouse firm, which consisted of the defendants Frank O'Reilly and George O'Reilly alone. And the warehouse receipts were given by the latter firm to MacCullough as representing the commission and produce firm, the owners of the goods. Two distinct entities were dealing with each other, and defendant George O'Reilly in signing the warehouse receipts on behalf of the storage and warehouse firm was not in any sense giving receipts "as of his own property" within the meaning of sub-sec. (d) of sec. 2 of the Bank Act.

Before the Judicature Act there might have been difficulty by reason of the rule which prevented the partners in one house of trade from maintaining an action at law against the partners in another house, where there was a common partner. But, even under the ancient jurisprudence, a suit in equity could be maintained in aid of the right. And since the Judicature Act there exists no reason why if two firms have a common partner an action should not be maintained by one against the other: *Lindley on Partnership*, 7th ed., p. 303 and note (s); and see note to *Bosanquet v. Wray*, 16 R. R. p. 677; *Con. Rules* 222 to 230 inclusive.

The last point urged for defendants was that plaintiffs failed to prove that the goods were not in the warehouse when possession was taken. Plaintiffs produced the warehouse receipts covering produce of the specified quantities. Plaintiffs' manager shewed that he from time to time and about every two weeks or month visited the warehouse and checked the goods and supposed and believed they were there, and he proved that they were not there when plaintiffs took possession. The onus was then on the owners or keepers of the warehouse to shew, if they could, that they were removed by plaintiffs or under their order, and to produce their receipts or orders. Nothing of this kind was established.

In the result the appeal should be allowed, and judgment should be entered for plaintiffs for the amount of their claim, unless defendants desire a reference to ascertain the amount, as they intimated at the trial and during the argument of the appeal.

The defendants other than Anthony O'Reilly and James A. MacCullough should pay to the plaintiffs the costs of the action and the appeal.

JUNE 29TH, 1906.

C.A.

WALKER-PARKER CO v. THOMPSON.

Vendor and Purchaser—Contract for Sale of Land—Authority of Agent to Contract for Vendor—Proof of Agency—Sub-agent or Collateral Agent—Specific Performance—Refusal to Enforce.

Appeal by plaintiffs from order of a Divisional Court (7 O. W. R. 125) allowing an appeal by defendant Minnie Hammerton from judgment of TEETZEL, J., in favour of plaintiffs in an action for specific performance of an alleged contract made by her, as vendor, for the sale to plaintiffs of a house and lot in Wellington street west, in the city of Toronto. Defendant Hammerton gave defendants the Real Estate Agency Co., an incorporated company, a written authority to sell the property, and the agreement which plaintiffs sought to enforce was signed by defendant J. Enoch Thompson, who was in fact manager of that company, as agent for the vendor. The latter asserted that she was not bound by Thompson's contract, and the Divisional Court so held.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

E. E. A. Du Vernet and T. L. Church, for plaintiffs.

H. H. Dewart, K.C., and D. D. Grierson, for defendants Hammerton.

OSLER, J.A.:—I think the judgment of the Divisional Court should be affirmed for the reasons stated by the Chancellor. The authority to sell was given by defendant Hammerton to the Real Estate Agency Co. The only agreement proved was one signed by defendant Thompson, who is not, in my opinion, proved to have been an additional or sub-agent, or, as it was said, a "collateral" agent.

There was, therefore, no contract proved within the Statute of Frauds, which is pleaded, and the appeal fails and should be dismissed with costs.

MACLAREN and MEREDITH, JJ.A., each gave reasons in writing for the same conclusion.

MOSS, C.J.O., and GARROW, J.A., also concurred.

JUNE 29TH, 1906.

C.A.

CASSELMAN v. BARRY.

Master and Servant—Injury to Servant—Negligence—Dangerous Work—Proximate Cause of Injury—Findings of Jury—Common Law Liability—Workmen's Compensation Act—Joint Tort-feasors—Death of One—Action against Survivor and Executors of Deceased—Excessive Damages—New Trial.

Appeal by defendants from order of a Divisional Court (7 O. W. R. 328) affirming judgment of CLUTE, J., upon the findings of a jury, in favour of plaintiff for \$6,500, in an action for negligence.

E. E. A. Du Vernet and F. W. Hill, Niagara Falls, for defendants.

F. W. Griffiths, Niagara Falls, for plaintiff.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.), was delivered by

GARROW, J.A.:—The firm of Barry & McMordie, contractors, were constructing a sewer for the city of Niagara Falls, and plaintiff was in their employment, when on 18th April, 1905, he was injured by an explosion of dynamite. The work was through rock which had to be blasted, for which purpose holes were drilled and charges of dynamite inserted and exploded by electricity.

Each blast usually consisted of about 4 holes. The method adopted was to remove it in benches, and at the time of the explosion they were working in what is called the third bench. The drills were operated by steam. The drill at which plaintiff was at work at the time of the explosion

was in charge of one Robert Forsyth as driller, and plaintiff was employed as driller's helper. Both were men of experience in such work.

There is no direct evidence shewing exactly how the dynamite which exploded came to be where it was. The theory put forward and apparently accepted by both sides is that in blasting a former bench a hole had not exploded or fully exploded, and that the hole which Forsyth and plaintiff were engaged in drilling was upon or very near the site of such former hole, with the result that upon the drill coming in contact with the former charge the explosion followed.

The negligence complained of in the statement of claim was in giving negligent orders regarding the drilling of holes near the dynamite which had not been exploded, and in not ascertaining whether such dynamite had exploded before ordering or permitting plaintiff to drill holes near the holes which had been filled with dynamite.

At the trial plaintiff was allowed to add additional causes of action under the Workmen's Compensation for Injuries Act by reason of defective plant, superintendence, &c.

According to the evidence called by plaintiff and undisputed, these old holes are always regarded as sources of danger, and are avoided in drilling the second or lower benches if possible. And the same undisputed evidence shows that it is the duty of the drillers to search for and select sites for new holes about to be drilled which shall be clear of old holes, and that Forsyth in discharge of this duty did search with hand and pick before giving the order to proceed, but found no hole.

Plaintiff did not himself search, but saw Forsyth doing so, and thought, as he deposed, that, as Forsyth was a practical man, he need not do so. Hood, another driller, and Cook, his helper, called by plaintiff, also gave evidence about the danger of old holes, the necessity of avoiding them in drilling new ones, and the duty of the driller to search. And upon the part of defendants it was deposed, and not contradicted, that the drillers had been expressly ordered to avoid all old ones in drilling new ones.

In other respects the evidence seems to have taken a wide range. The trial really concerned the happenings at one spot, but the evidence took in the whole work or system under which the work was being carried on. Other apparently unexploded holes were freely referred to, and the condition of

the battery used to create the spark was made a feature, with the result that apparently the real questions in issue were somewhat obscured.

The jury found: (1) that defendants were guilty of negligence; (2) that such negligence consisted in having no organized system of inspection of the work and appliances in general; the battery was defective; no care had been taken to make such that the charge in every hole had been exploded; (3) no contributory negligence; (4) damages at common law \$6,500, or if under the statute \$1,800. And the learned Judge directed judgment for the former sum, and his judgment was affirmed in the Divisional Court.

The defendants contend, among other things, that there is no specific finding of negligence causing the accident, and that in any event the damages are excessive.

They also contend that the action cannot be maintained against the executrix of James Barry, who died after the accident. I agree with the Divisional Court upon this objection. To hold otherwise would be to ignore the express provision of the statute R. S. O. 1897 ch. 129, sec. 11. And in addition it may be pointed out, although additional ground is not at all necessary, that the present action grows out of the contractual relation of master and servant.

I am of the opinion that defendants' other objections are well founded. Plaintiff was injured because his fellow servant Forsyth, contrary to his orders and to his duty, selected the site of an old hole upon which to drill a new one, and not because defendants had no organized system of inspection or a defective battery, or exercised no care with reference to old holes. All these might well be conceded, but they were each and all perfectly harmless but for the acts of Forsyth, the real proximate cause of what is complained of. And yet there is no finding directed to ascertaining or characterizing this, the vital issue between the parties.

Forsyth's failure to find the old hole may or may not have been negligent. There was water upon the surface, and perhaps other difficulties, making it not easy to find the old hole. At common law his negligence (if he was negligent) being simply that of a fellow servant would not affect defendants.

But it would be different under the statute if, as there is some evidence, he was in the position of one having authority over plaintiff. And this should have been dealt with by the

jury rather than the far away matters of organized systems and defective batteries, about which it is so easy and so inviting to generalize.

I also think the damages excessive, and upon both grounds am of the opinion that a new trial should be ordered.

The costs of the appeal should be to defendants in any event, and the costs of the last trial should be costs in the cause.

JUNE 29TH, 1906.

C.A.

CONNELL v. ONTARIO LANTERN AND LAMP CO.

Master and Servant—Injury to Servant—Negligence—Defective Condition of Machine—Findings of Jury.

Appeal by defendants from order of a Divisional Court (7 O. W. R. 77) dismissing appeal by defendants from judgment for plaintiff for \$1,000 in an action for damages for negligence, tried before MEREDITH, J., and a jury at Hamilton.

E. E. A. DuVernet, for defendants.

P. D. Crerar, K.C., for plaintiff.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, J.J.A., TEETZEL, J.), was delivered by

OSLER, J.A.:—The action is brought under the Workmen's Compensation for Injuries Act, for injuries sustained by plaintiff by reason of the defective condition of a machine at which he was working.

It appeared that plaintiff was employed in defendants' factory as operator of a stamping machine for cutting out discs from a brass sheet. The sheet was coiled on a roll and fed to the machine by the workman unwinding it from the roll and drawing or leading it into position on the machine

table below a die or punch, which, as it fell upon the sheet, stamped or cut out the disc. The machine was set in motion and the die caused to fall by the operation of a lever pressed by the workman's foot, and as each disc was cut the die, if the machine was in good order, should return to its original position and remain there until the workman again set the machine in motion by repeating the operation.

On the occasion in question, while plaintiff's hand was momentarily between the table and the die in the course of adjusting the brass sheet, the die unexpectedly fell, with the result that plaintiff lost three of the fingers of his right hand. The case made at the trial was that the machine had a habit of occasionally "repeating," that is, of letting the die fall without being set in motion by the operator, and that such defect had been brought to the notice of defendants' foreman, whose duty it was to see that the machine was in proper condition, and that, owing to his negligence, it had not been repaired or remedied.

The defence was that there was no evidence for the jury; that the machine was in a defective condition; that plaintiff had himself set it in motion by moving the treadle; and that there was contributory negligence on his part in having his hand where it was when the die fell and injured it.

The jury found that plaintiff's injury was caused by a defect in the machine; that the defect was weakness of spring owing to a nut coming loose, which could have been rectified by the use of a jam nut; and that the defect was discovered but not permanently remedied owing to the negligence of the company, through their foreman. Other findings of the jury absolved plaintiff from contributory negligence.

An examination of the proceedings discloses no ground upon which we can properly interfere with the order . . . affirming the judgment at the trial. There was evidence which could not have been withdrawn from the jury that the machine had the habit (if that expression may be used) of unexpectedly repeating or letting the die fall when it had not been set in motion by the operator, and when, therefore, it ought not to have done so. It was proved that this ought not to happen with a machine of this kind if in good order

with all its parts tight and well adjusted; and that it did happen was evidence that the machine was in a defective condition and dangerous to the workman. *Res ipsa loquitur*.

It was strongly urged by Mr. DuVernet that the accident could only have happened by plaintiff's own negligence in accidentally or inadvertently pressing the lever while adjusting the brass sheet upon the table, and, had there been no evidence of the machine ever having misbehaved itself before, there would be great weight in the argument as supporting the contention that in the condition or construction of the machine the occurrence was mechanically impossible. But this was, upon the evidence, a matter for the consideration of the jury, and when the machine is shewn to have had a bad name, it becomes less difficult to condemn it and to accept the workman's denial of carelessness on his part. Suggestions of the plaintiff's negligence in other respects were equally matters for the jury to pass upon. . . .

It was also urged that there was no sufficient finding of any defect in the machine causing the accident. Plaintiff's whole contention at the trial was that the defect in the machine was the bad habit I have spoken of. His counsel took the position, and quite rightly, that it was enough for him to prove this as a fact, and that it was not necessary for him to go further and find out or prove the inner cause of the defect, in other words, the defect which caused the defect he relied on. That might be a thing very difficult to do and more difficult to explain intelligently to a jury. However such evidence was given. The charge of the Judge shews very clearly what was the defect relied upon and about which the parties were contending, viz., the plain unmistakable defect of repeating; but he put a further question to the jury with the object of finding out the cause of this defect. Mr. Crerar was careful to say that he was not bound to satisfy the jury as to this, but the question and answer were useful to shew that the repeating habit is not mechanically impossible, and the answer, though not expressed with verbal accuracy, does suggest what appears to be a very plausible reason for the irregular action of the machine.

On the whole I think we can only dismiss the appeal, with the usual result as to costs.

JUNE 29TH, 1906

C.A.

OTTAWA ELECTRIC CO. v. CITY OF OTTAWA.

Municipal Corporations — Purchase and Sale of Electrical Energy—Powers of Corporation—Special Act—Construction—By-laws—Ultra Vires — Contract — Debentures — Acquisition of Plant of Going Concern—Purchase of Supply of Power—By-law Creating Debt not Payable within Municipal Year.

Appeal by the plaintiffs from judgment of BOYD, C. (O. W. R. 930), dismissing the action with costs.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, J.J.A.

W. Nesbitt, K.C., and G. F. Henderson, Ottawa, for plaintiffs.

G. F. Shepley, K.C., and T. McVeity, Ottawa, for defendants.

Moss, C.J.O.:—The principal relief sought in the action is a declaration that three certain by-laws passed by the defendants' council, and numbered 2489, 2503, and 2504 respectively, were ultra vires of defendants, and an injunction to restrain defendants from acting upon or under the agreements embodied in by-laws numbered 2503 and 2504.

The Chancellor upheld all three by-laws.

Under an agreement dated 17th June, 1901, made between certain persons representing a company known as the Consumers Electric Company and defendants, the latter were entitled to acquire all the property of the company both real and personal. The property comprised a station building, machinery, and equipment, besides pole lines, transformers, meters, arc lamps, cross arms, and other plant necessary and required for the distribution and supply of electricity. The defendants, having decided to acquire the property under the provisions of the agreement, proceeded to pass by-law No. 2489, acting in this regard under the provisions of a special Act of the legislature, 57 Vict. ch. 75.

The by-law, after reciting the Act and the agreement with the Consumers Electric Company, that defendants had decided in the exercise of their powers to acquire the property, and that, in order to provide for the purchase price, it was necessary to borrow \$200,000 and to issue debentures of the city for the said sum, enacted: 1. That the corporation may produce, manufacture, use, and supply to others to be used, electricity for any purpose to which the same may be applied, and to that end acquire the property of the Consumers Electric Company, and reconstruct, alter, or improve the works. 2. In order to provide for the purchase thereof, the sum of \$200,000 may be borrowed, and for the purpose of raising the said sum debentures to the amount may be issued and signed by the mayor on 5th June, 1905, and be payable on 5th June, 1935.

Then followed the usual directions as to the preparation, signing, and issue of the debentures and the raising of the special rate for payment of interest and principal, and for submission to the vote of the ratepayers.

The by-law was duly submitted to the vote of the ratepayers in accordance with the provisions of the Municipal Act, was ratified by the ratepayers, and was thereafter finally passed by the council of defendants on 5th June, 1905. It is conceded that all the formalities of the Municipal Act with regard to the passing of by-laws for the issue of debentures were complied with, and it is not alleged or suggested that the by-law is open to attack on any ground of irregularity. It was duly registered on 6th June, 1905, under sec. 396 of the Municipal Act.

This action was commenced on 21st July, but no certificate under the hand and seal of the clerk of the Court stating that the action had been brought was registered within the period of 3 months from the registration of the by-law, as required by sec. 399. The by-law is therefore protected from attack in this action by virtue of sec. 399 unless, as is contended, there was no jurisdiction to pass it. Taken by itself, there is nothing in the by-law to indicate want of jurisdiction in the council.

The special Act, 57 Vict. ch. 75, enacts that defendants shall, in addition to the powers conferred by the Municipal Light and Heat Act, which is thereby incorporated, have power to produce, manufacture, and use and supply to others to be used, electricity for motive power and for any other

purpose to which the same can be applied . . . and to acquire and hold lands, water powers, machinery, and all other property, easements, and privileges necessary therefor, and shall for and with respect to such powers and purposes have all and every the powers which are by the said Act conferred on municipal corporations with respect to light and heat. Then by sec. 2 defendants are empowered for the purposes mentioned in the preceding section of the Act and the Municipal Light and Heat Act, and in the exercise of any other powers possessed by the corporation in connection with the objects in the preceding section referred to or any of them, to borrow any sums of money not exceeding \$250,000, and to issue debentures therefor payable in 30 years.

A comparison of the by-law with these provisions shews that it is within the prescribed limits in every respect.

It takes power to produce, manufacture, and use and supply to others to be used in the terms of the Act.

It provides for the acquisition of lands, machinery, and other property necessary for the purpose, and, this being one of the purposes authorized by the Act, it proceeds to provide for the issue of debentures within the prescribed limit. There is nothing by which any person intending to purchase the debentures or otherwise interested in the by-law could detect any overstepping of the powers possessed by the council. And it is scarcely disputed that if this by-law stood alone it could not be successfully impeached on the ground of want of jurisdiction.

But it is said that the subsequent action of the council in passing by-law No. 2504, providing for the execution of an agreement between the defendants and the Ottawa and Hull Power and Manufacturing Company, by which defendants' contract with the company for the acquisition from it of electrical power for the purpose of using it and supplying it to others to be used, by means of the property and plant acquired from the Consumers Electric Company, reflects back upon by-law No. 2489. It is urged that the action of the council in passing by-law No. 2504 shews that defendants never intended to enter upon the production and manufacture of electricity for themselves as they are authorized to do, but to utilize the property purchased in another way, that is, by means of power procured from the Ottawa and Hull Power and Manufacturing Company. In other words, that there was a scheme on the part of defendants to make an illusory

use of their actual powers in order to carry out an illegal and unauthorized undertaking.

No such case is presented by the pleadings, nor is there on the record any material for entering upon and determining such a question.

Upon the pleadings nothing is presented but the bald question of law whether the by-laws are ultra vires. And in the state of the record it ought to be assumed that the council acted in good faith, in the belief that it had the power which it was assuming to exercise. And, so far as by-law No. 2489 is concerned, I agree with the Chancellor that it was in furtherance of the primary object of the special Act to acquire the plant of a going concern by which electrical power was to be supplied to the city and its inhabitants. And, that being so, there was jurisdiction to pass the by-law, and it is not now open to successful attack.

But as regards by-law No. 2504, I am unable to agree that it was competent for the council to pass it. Neither in the special Act nor otherwise is there to be found power or authority to acquire, that is, to purchase, the supply of electricity to be used and supplied to others to be used in the manner contemplated.

The power is "to produce, manufacture, and use, that is, to enter upon the process of production and manufacture, and to use electricity so produced and manufactured and to supply it to others." I am unable to read these words as justifying a contract for the purchase of a supply of the power from another producing and manufacturing concern. And I think that by-law No. 2504, which is aimed at and intended for that purpose, is not within the powers possessed by defendants. It is also bad, in my opinion, as creating a debt not payable within the municipal year. With regard to this by-law, we are all agreed that it cannot be sustained. . . .

In my opinion, by-law No. 2504 ought to be declared invalid and void, and as to the other two the appeal should be dismissed.

Plaintiffs are entitled to the general costs of the action and the appeal, any costs of and occasioned by the attack on the other by-laws to be set off.

GARROW, J.A., gave reasons in writing for the same conclusion.

OSLER, MACLAREN, and MEREDITH, J.J.A., concurred.

JUNE 29th, 1906.

C.A.

SHEA v. JOHN INGLIS CO.

Master and Servant—Injury to Servant—Workmen's Compensation Act—Negligence of Fellow Servant—Person to whose Orders Plaintiff Bound to Conform — Evidence—Findings of Jury—Damages—Claim of Father of Infant Plaintiff for Medical Expenses and Loss of Services—Absence of Evidence to Support — Infant Plaintiff Apprenticed to Defendants—Duty of Defendants to Supply Medical Attendance—Right of Infant to Require Payment of Wages to Himself.

Appeal by defendants from order of a Divisional Court (6 O. W. R. 962, 11 O. L. R. 124), affirming with a variation the judgment of MEREDITH, C.J., upon the findings of a jury, in favour of plaintiffs for \$1,500, in an action brought by John Shea, a lad of 18 years of age, by his father as next friend, and by his father in his own right, to recover damages for injuries sustained by the son while in the employment of defendants, and for expenses incurred by the father as the result of the injuries. The boy was an apprentice at the trade of boiler making. He was usually engaged in rivetting, but on 6th September, 1904, he was sent by the foreman of the shop temporarily to replace an absent lad who was the regular helper of Green, the operator of a hydraulic rivetting or bulling machine. The boy was injured while assisting Green in the rivetting of a boiler.

E. E. A. DuVernet and R. H. Greer, for defendants.

W. T. J. Lee, for plaintiffs.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, J.J.A.), was delivered by

MOSS, C.J.O.:—. . . Defendants' contentions are: (1) that there was no evidence upon which the jury could properly find, as they did, that one Green was a person in the employ of defendants to whose orders or directions the in-

infant plaintiff John Shea, at the time of the injury, was bound to conform, or make the further finding that Green was negligent in his orders or directions to the infant plaintiff, in consequence of which he received his injuries; and (2) that the award of \$1,500 damages was not sustainable either as entered at the trial or as modified by . . . the Divisional Court.

As to the first branch, there is ample evidence to sustain the findings of the jury, and, for the reasons fully and clearly expressed by the Divisional Court, its conclusions in this respect should be affirmed.

With regard to the damages, it is plain from what took place when the jury returned their answers, as well as from a perusal of the evidence and proceedings at the trial, that the jury intended to award . . . \$400 to the adult plaintiff, and that that award was intended as a reimbursement to him for a supposed liability for the medical expenses incurred in connection with the injury to his son, the infant plaintiff.

The answer made by the jury to the question addressed to them by the Chief Justice, after they had handed in their answers to the questions submitted, shews that they intended to assess the infant plaintiff's damages at no more than \$1,100.

Although it is alleged in the statement of claim that the adult plaintiff had been put to great expense, trouble, and loss in caring for and providing for the infant plaintiff, and had lost his services, neither he nor any other witness gave any evidence in support of the claim. He was examined as a witness, but was not questioned on this point. He was not even asked whether he was liable to pay Dr. Macdonald or whether he had incurred any other expense or liability in the matter. Dr. Macdonald said that he understood that he was called in by defendants to attend the infant plaintiff, and he made no reference to any request for his services by the father. The infant plaintiff was not questioned on the subject.

It appears that the infant plaintiff was apprenticed to defendants for a term of years which had not expired at the date of the trial. It does not appear whether the agreement

of apprenticeship was entered into under R. S. O. 1897 ch. 161, but, even if it were, defendants would, according to the opinion of Patteson, J., in *Regina v. W. Smith*, 8 C. & P. 153, be bound to provide the infant plaintiff with proper medical advice and medicines. . . . And, although sec. 12 of ch. 161 makes it the master's duty to provide suitable board, lodging, and clothing during the term of the apprenticeship, it may be that defendants, whether knowingly or unknowingly, were in calling in Dr. Macdonald merely fulfilling the greater obligation which, according to the ruling of that very learned Judge, the law imposes upon the master in the case of an apprentice.

It does not appear either whether the contract of apprenticeship was with the infant plaintiff alone, or whether his father was a party, but apparently the infant plaintiff was receiving the wages himself, and the father has not shewn that he was deriving or could derive any benefit from them during the term of the apprenticeship. The infant plaintiff was apparently entitled to require payment of his wages to himself: R. S. O. 1897 ch. 161, sec. 9; *Simpson on Infants*, pp. 180, 181; *Delesdernier v. Burton*, 12 Gr. 569; *Wilson v. Boulter*, 26 A. R. 184 . . . 195, and cases there cited.

There is no evidence on the record to support any claim for loss of services by the adult plaintiff, and, so far as the action concerns claims on his behalf, it fails. That being so, the judgment must be reduced to \$1,100.

It is very probable that the disposition of this branch of the case proposed by the Divisional Court would work justice to all parties, but unfortunately, as defendants do not consent to be bound by it, the finding of the jury and the state of the record preclude such a disposition of the matter.

The judgment should be varied by dismissing the action as respects the claim of the adult plaintiff without costs, and by reducing the damages to \$1,100, to be paid into Court for the infant plaintiff.

There should be no costs of the appeal to the Divisional Court or in this Court.

JUNE 29TH, 1906.

C.A.

McWILLIAMS v. DICKSON CO. OF PETERBOROUGH.

Timber—Dispute as to Ownership—Crown Lands—Location—Cancellation—Timber Licenses—Settlement—Purchase—Cheque—Acceptance on Account—Accord and Satisfaction—Injunction—Consent Order in Action afterwards Dismissed for Want of Prosecution—Binding Agreement—Title—Possession—Jus Tertii—Assignment of Location—Regulations of Department—Settlement Duties—Forfeiture—Ruling of Department—Reference.

Appeal by defendants and cross-appeal by plaintiff from judgment of STREET, J. (6 O. W. R. 706), directing a reference to determine what sum plaintiff was entitled to, beyond what had been paid to him before action, for certain logs cut by him, which defendants had taken possession of and appropriated.

G. H. Watson, K.C., and G. M. Roger, Peterborough, for defendants.

R. F. McWilliams, Peterborough, and A. R. Clute, for plaintiff.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLAREN, MEREDITH, JJ.A.), was delivered by

MACLAREN, J.A.:—The logs in question had been cut upon some 11 lots in the 3rd and 4th concessions of the township of Cavendish, in the county of Peterborough, which had been covered by timber licenses held by defendants. Plaintiff claimed to have acquired them as the assignee of certain locatees under the Free Grants Act, R. S. O. ch. 29, and under the Veterans' Act, 1 Edw. VII. ch. 6; and took the ground that, by the terms of these statutes and defendants' licenses, the lands were, by such location, taken from under the licenses.

The location of 7 of the lots was set aside by the Crown Lands Department, and these lots restored to defendants' license, it being a part of the departmental order that plaintiff was to be paid the reasonable cost of cutting the timber

on these lands, as if the work had been done in the ordinary course of lumbering operations. The logs from these lots were, however, inextricably mixed with those from the other lots, to which plaintiff retained a good title. Various attempts were made at a settlement, but other litigation and the present action have been the final result. . . .

The appellant took the ground at the trial and before us that the lands in question had been acquired, not by plaintiff for himself, but in reality by and for his father, who was an official of the department under the Public Lands Act, and that consequently no right had been acquired to them. The trial Judge found, on the evidence, that there was a bona fide intention from the beginning that the lands were to be the property of plaintiff and not of his father, and the report of the evidence appears fully to sustain this finding.

Defendants further contended that they had fully paid plaintiff by accepting his order for \$500 and sending him a cheque for \$5,457.93 as in full payment, which he accepted and cashed. Plaintiff acknowledged receipt of the letter containing the cheque, and stated that he accepted the amount as on account. The trial Judge held that this was not a settlement, and his judgment is in accordance with the law as laid down in *Day v. McLea*, 22 Q. B. D. 610, and *Nathans v. Ogden*, 22 T. L. R. 57, and by this Court in *Mason v. Johnston*, 20 A. R. 412.

The appellants also took the ground that certificates under the Veterans' Act could not be assigned, and that, if they could, plaintiff could not become the holder of so much land as had been assigned to him. The departmental documents dealing with these certificates and the locations under them are very informal, but, as pointed out by Street, J., there is nothing in the Act to prevent the original locatees from contracting to convey before location and conveying after location the land located to them.

The trial Judge has analysed the evidence and traced the title regarding each of the lots in question, and, after a careful perusal of the evidence, I am of the opinion that his conclusions are correct.

I am also of the opinion that he was right in holding that the ruling of the Department of Crown Lands of 1st February, 1904, should control and govern the rights of the parties, as it was practically accepted and acted upon by them. Also that

in any reference or inquiry as to the quantity or value of the logs the terms of the consent order made by Falconbridge, C.J., on 26th May, 1904, in the previous action between the same parties, which was dismissed for want of prosecution, should form the basis of such inquiry, as it is still a valid and subsisting agreement.

The appeal of defendants should therefore be dismissed with costs.

Plaintiff cross-appealed against that part of the judgment which upheld the departmental order cancelling the location of 7 of the lots and giving defendants the logs cut upon these lots, subject to their paying for the cost of cutting, etc. I am of the opinion that this part of the judgment is also right, and that the cross-appeal should be dismissed with costs.

JUNE 29TH, 1906.

C.A.

McLEOD v. LAWSON.

McLEOD v. CRAWFORD.

Contract—Mining Location—Discovery of Minerals—Agreement between Prospectors—Declaration of Interests of Co-owners—Statute of Frauds—Trust—Lease Taken in Name of One—Agreement of Lessee with Stranger—Construction—Ratification by Co-owners—Notice of Interests of Co-owners—License to Mine—Taking out Ore—Share in Proceeds—Fraud—Amendment—Land Titles Act—Injunction—Costs.

Appeal by defendant Herbert G. Lawson from judgment of MABEE, J. (7 O. W. R. 519), in the first action, which was brought by Murdoch McLeod and Donald Crawford to have their rights declared in reference to a certain mining location of 40 acres in the township of Coleman, in the district of Nipissing, a mining lease whereof was granted to defendant Thomas Crawford. Subsequent to the commencement of the action John McLeod and John McMartin were added as defendants. Defendant John McLeod was afterwards declared a lunatic, and Thomas Harold, his committee, was thereafter

also added as a defendant. Defendant Thomas Crawford entered into an agreement under seal with defendant Lawson dated 8th June, 1905, in respect of the location. By the judgment appealed against, plaintiffs and defendant John McLeod were each declared entitled to a one-quarter interest in the location, and an injunction was granted against defendant Lawson, and directions were given for the disposition of the ore which had already been mined and converted into money.

There was also an appeal by defendant Thomas Crawford from the judgment in the first action and from the judgment in the second action, which was brought by John McLeod against Thomas Crawford, Donald Crawford, and Murdoch McLeod, for a declaration that plaintiff was entitled to a one-quarter interest in the mining location mentioned. The judgment declared that John McLeod was so entitled, and from that Thomas Crawford appealed in so far as his rights and interest were affected.

The actions were tried together by MABEE, J.

The appeals were heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

S. H. Blake, K.C., W. M. Douglas, K.C., and A. M. Stewart, for defendant Lawson.

I. F. Hellmuth, K.C., and W. H. Irving, for defendant Thomas Crawford.

G. H. Watson, K.C., and J. B. Holden, for plaintiffs Murdoch McLeod and Donald Crawford.

R. McKay, for John McLeod and Thomas Harold.

A. D. Crooks, for defendant McMartin.

Moss, C.J.O.:—In these two cases there are altogether three appeals. There is first of all the main appeal by defendant Lawson in the first case, to which plaintiffs and all the defendants are respondents; then an appeal by defendant Thomas Crawford, supported by the plaintiffs, in the same case, to which defendant Lawson is the respondent; and finally an appeal by defendant Thomas Crawford in the second case, to which plaintiffs in that action are the respondents. The actions were tried together by Mabee, J., without a jury, and in a considered judgment he has set forth the material facts as he found them. A number of matters

which were more or less in dispute before the trial are now not questioned, but the appellants dispute some of the findings of fact as well as the conclusions of law upon which the judgments are based.

The defendant Thomas Crawford does not deny that plaintiffs are jointly and equally interested with him in the mining location held by him under the lease from the Crown dated 5th January, 1905, but he denies that John McLeod is entitled to any interest therein, and contends that, if he has any, it is only in the shares of plaintiffs in the first action.

The purpose of the second action is to have it declared that John McLeod is entitled to an equal share or interest in the location with defendant Thomas Crawford and the plaintiffs in the first action, each being possessed of a one-quarter share therein.

The trial Judge determined in favour of John McLeod. The defendant Thomas Crawford appeals from the judgment so declaring, and it may be convenient to dispose of this branch of the case at this stage. The evidence establishes that John McLeod was one of the prospecting party by whom the discovery on the location was made, and that under an agreement, assented to and acquiesced in by Thomas Crawford, John McLeod was admitted to an equal one-fourth share or interest with Murdoch McLeod, Donald Crawford, and Thomas Crawford; that this was fully understood and agreed to before it was arranged that the application for the lease was to be made in the name of Thomas Crawford instead of that of Murdoch McLeod, who was the actual discoverer; that Thomas Crawford knew that the application was for the benefit of all 4, and that, if the lease was issued to him, he was to hold for their benefit. It is evident that if before the issue of the lease he had disputed John McLeod's right to share with himself and the others, they would not have agreed to the issue of the lease to him. If at the time when it was agreed that the application should be in his name he had it in his mind that John McLeod was not entitled to an equal share, he did not disclose it to his associates, and by his silence as well as by his acts he led them to believe that he was to hold the lease when issued to him on behalf and for the benefit of all 4 in equal shares. Subsequently to the issue of the lease, and before the time of the dealings with defendant Lawson, he admitted that John McLeod was entitled to a share, and to the witness Bowen he stated it was

a one-quarter share. The trial Judge's finding of fact as to the extent of John McLeod's share or interest should be affirmed. And in the circumstances shewn the defence of the Statute of Frauds presents no difficulty. It is quite plain that Thomas Crawford was not in a position to apply to the Crown Lands Department for a lease in his own right. He was not a discoverer, nor was he a purchaser of rights. It was only as the nominee of the actual discoverer, and with the acquiescence of the others, that he could support an application. But for the action and assistance of the associates in enabling him to apply on the strength of their rights, it would have been a fraud upon the Crown for him to have obtained a lease. In truth he could only apply as representing their rights, and these were only made over to him to hold and exercise in trust for the whole body of associates. To deny the rights and interests of his associates would be a fraud on them as well as upon the Crown. And it is well established law that the Courts will not permit the Statute of Frauds to be made an instrument of fraud by precluding parol evidence shewing the fraud.

The case of *Isaac v. Evans*, 16 Times L. R. 113, was much relied on by counsel for Thomas Armstrong. As appears from the subsequent report at p. 480 of the same volume, the ruling was upon the opening of counsel at the beginning of the trial, and the case was remitted for trial by the Court of Appeal. And there does not appear to have been any acquiescence by the Court of Appeal in the views of the trial Judge. Assuming the correctness of his views with regard to the facts of the case, it does not govern here, for the facts are not similar. There had been no acquisition by either of the parties to the action of any interest in the lands prior to the grant of the lease to the defendant, while in the present case there were rights entitling the holder to apply for and obtain a lease, and these were in effect made over to Thomas Crawford, not for his own benefit alone, but in order to secure the rights of all parties interested. And in these circumstances the view of the Statute of Frauds taken in such cases as *Heard v. Pilley*, L. R. 4 Ch. 548, and *Rochefoucauld v. Boustead*, [1897] 1 Ch. 196, is applicable here. See also *Barton v. McMillan*, 19 A. R. 602, 20 S. C. R. 404.

The appeal in the second action should therefore be dismissed.

Then with regard to Thomas Crawford's appeal in the first action. His contention is that the agreement between him and defendant Lawson is void as having been procured by fraud, misrepresentation, and concealment of material facts, by defendant Lawson. When the action went to trial there was no issue of this kind raised by the pleadings. The plaintiffs impeached the agreement on the ground that it was made without the knowledge, consent, or authority of the plaintiffs and John McLeod, and in disregard of their rights and interests. The defendant Thomas Crawford in his statement of defence contented himself with denying all the allegations of the plaintiffs' statement of claim. In form this amounted to an affirmation of the validity of the agreement, and at the opening of the trial his counsel applied for leave to add to his defence a paragraph alleging acquiescence by the plaintiffs in the agreement. And it was not until the trial had been adjourned from 14th December, 1905, to 8th January, 1906, and again to 26th February, that an application was made on Thomas Crawford's behalf to set up the contention of fraud. The trial Judge refused the application. But during the continuance of the trial evidence was admitted shewing all the circumstances surrounding and connected with defendant Lawson's dealing with Thomas Crawford, including his knowledge concerning the probable value of the location arising from an inspection made by himself and others and information given to him as to indications discovered upon it. The Judge dealt with the question, and came to the conclusion that no case was made for declaring the agreement void. The Judge properly refused to allow the amendment asked. If sought to raise an issue between co-defendants at a very late stage of the proceedings setting up a claim that defendant Thomas Crawford had never thought of suggesting during the progress of the litigation from July, 1905, and which was doubtless a suggestion of counsel as an afterthought. It may be that having refused the amendment he should not have considered the evidence said to bear upon the question. It was not in issue, and defendant Lawson was not called upon to defend himself against the charge. But a perusal of the evidence leads to the same conclusion as that reached by the trial Judge. It discloses no case of fiduciary or other relationship or any other position towards Thomas Crawford placing Lawson

under any obligation to deal with him otherwise than at arm's length, or to disclose to him the knowledge he possessed of the location or its probable value. He did no more than any purchaser of a property from another is entitled to do. In order to succeed in his contention it was incumbent on Thomas Crawford to shew not only that great advantage had been taken of him and that such advantage arose from superiority of skill or information, but also that there was some obligation resting on Lawson to make disclosure of the circumstances which had come to his knowledge respecting the location. And in this he failed.

In the manner in which the question has been raised it is not a case of the Court being asked to decree specific performance, and Thomas Crawford resisting, in which case perhaps less would be required of him: *Walters v. Morgan*, 3 DeG. F. & J. 723; *Walmsley v. Griffith*, 10 A. R. 322. The transaction itself was one in which each probably had good reason to suppose there was a certain risk. Thomas Crawford does not appear from the evidence to be a person likely to be easily overreached. His occupation and dealings seem to fit him for coping with others in a land or mining transaction, and he understood perfectly the nature of the agreement he was entering into. Lawson undertook all the risk of possible failure of the location to develop in paying quantities. He paid \$200 and undertook to prospect and develop the location at his own expense, and to give one-fourth of the gross products to Thomas Crawford. And it was not until the lapse of many months that it occurred to Thomas Crawford or his advisers to set up that any unfair advantage had been taken of him in the transaction. His appeal on this branch of the case should also be dismissed.

There remains the appeal of the defendant Lawson against the judgment pronounced in favour of plaintiffs in the first action.

The learned trial Judge, while upholding the agreement as between Thomas Crawford and Lawson, was of opinion that it was not binding on plaintiffs Murdoch McLeod and Donald Crawford and the defendant John McLeod. He appears to have reached this conclusion chiefly upon his view of the Lands Titles Act, R. S. O. 1897 ch. 138, though he also dealt with the effect of the agreement itself. He was of opinion that, although plaintiffs were not aware of the agreement having been made until the evening of the

day on which it was entered into, yet upon learning of it they agreed and intended to ratify it. But because the fact of ratification was not communicated to Lawson, and he did not change his position on the faith of it, no effect was given to their action in that regard.

He was also of opinion, and in this he is supported by the evidence, that Lawson had no notice or knowledge of the rights or interests of plaintiffs and John McLeod. But he appears to have proceeded upon sec. 21 of the Lands Titles Act, and to have come to the conclusion that it prevented him from dealing with the land comprised in the lease in any way so as to affect the interests of plaintiffs or John McLeod. The section should be read in connection with other sections of the Act which have a material bearing, as modifying the provisions of sec. 21 as applicable to letters patent from the Crown demising lands or mining rights in the district of Nipissing. Section 169 puts Crown demises of this kind on the same footing apparently as letters patent granting the land in fee in certain districts, and among others the district of Nipissing. And it seems that sec. 21 is intended to apply to leases or leasehold interests created after the issue of letters patent from the Crown. The rights that are reserved by sub-sec. (4) are in respect of the person who becomes the first registered owner of leasehold land. As against him, where he is not entitled for his own benefit, the registration as first registered owner does not make him the owner nor cut out the unregistered estates, rights, interests, or equities of the persons who are entitled to the land registered. But this does not, at all events in the case of lands or mining rights in the district of Nipissing demised by letters patent from the Crown, affect the rights of the registered owner to deal with third persons or the right of third persons to deal with them in the absence of a caution or useless in the case of fraud. The provisions of sec. 103 indicate the intention of the Act to permit registered owners to deal with the lands and third persons to deal with them in respect of the lands, although it may appear on the register that the registered owner is a trustee. And it could scarcely have been intended that a purchaser from a registered owner of leasehold lands under sec. 21 was to be obliged to take the lands subject to unregistered estates, rights, interests, or equities, even though he had no notice of the existence of any. The effect would be that no persons could

safely deal with the registered owner, lest claims the existence of which there were no means of ascertaining might be set up. The result would certainly not be in accord with the policy of an Act the object of which, as avowed in the title, is to simplify titles and facilitate the transfer of land.

Apart from the Act, the plaintiffs and John McLeod, by joining as they did in enabling the lands to be vested in Thomas Crawford, thereby held him out to third persons as authorized and enabled to deal with the land as his own. Had they desired to preserve their right to be consulted, it was incumbent upon them to file a caution, which they neglected to do until after the agreement with Lawson and after he had filed a caution for his own protection.

There is no pretence that Thomas Crawford was acting in collusion with Lawson, or that he was not acting in the transaction with him in what he supposed to be the best interests of all. He was doing the best he could to make a bargain advantageous to himself and his associates. All his interests were to get the most he could for himself and them.

Lawson dealt with the person duly authorized and empowered to deal with the lands, and, so far as the evidence discloses, he entered into the agreement in good faith and without any notice or knowledge of any rights, interests, or claims which should have prevented him from dealing with Thomas Crawford. And the plaintiffs and John McLeod should be held bound by the agreement as fully and to the same extent as Thomas Crawford.

The next question is, what did Lawson acquire by virtue of the agreement? It was not a term, or a leasehold estate or interest. But it was more than a mere personal license. It was a right to enter upon and win and remove ore and minerals. But there is nothing in the language of the agreement to lead to the conclusion that an exclusive right was granted or intended to be conferred. The highest that can be claimed for it is that it was a *profit à prendre*, and, as pointed out by Lindley, L.J., in *Duke of Sutherland v. Heathcote*, [1892] 1 Ch. 475, this is not an exclusive right unless it can be clearly inferred from the language of the grant that it was so intended. He said (p. 484): "A *profit à prendre* is a right to take something off another person's land; such a right does not prevent the owner from taking the same sort of thing from off his own land; the first right may limit but not exclude the second. An exclusive right t

all the profit of a particular kind can no doubt be granted; but such a right cannot be inferred from language which is not clear and explicit." He then referred to Lord Mountjoy's case, where the words of grant of the right to take ores, etc., were followed by the words "without the let or interruption of the person making the grant," and said that it has always been regarded as a leading authority for the proposition that a grant in fee of liberty to dig ores does not confer on the grantee an exclusive right to dig them, even if the grant is in terms without any interruption by the grantor. Lawson's right was therefore a right not excluding plaintiffs or others claiming under them. And it only extended to 31st August, 1905.

He claims to be entitled to an extension of his rights by virtue of the last clause of the agreement, but, apart from the question of fact as to whether he ever put himself in a position to claim the execution of the terms of that clause, it is in itself of too vague and indefinite a character to be capable of enforcement. Putting upon it the construction that it leaves it with him to name the time for which he may desire to use it—the most favourable for him—it would be necessary that he should do so before 31st August, and he did not place himself in that position, by a formal notice or requisition to that effect.

His rights under the agreement must be considered as ended on 31st August. But the institution of and proceedings in the action prevent the case from being now dealt with wholly on that footing. The injunction order, while restraining Lawson from removing ore or mineral until the trial or other final disposition of the action, gave him liberty to proceed with mining operations subject to supervision by plaintiffs and the keeping of accounts. And under the liberty thus given operations have been carried on probably to the present time. The result of the view of the rights of the parties here taken is that defendant Lawson was entitled to proceed with his operations under and in accordance with the terms of the agreement until 31st August—plaintiffs and defendants Thomas Crawford and John McLeod being entitled to one-fourth of all the ore or mineral mined or taken up to that date, or one-fourth of the value, as they may elect. Plaintiffs and defendants Thomas Crawford and John McLeod are entitled to all mined or taken since that date, subject, however, to the allowance to defendant Lawson of the

actual working expenses of the operations since that date, and to a fair allowance for his care and trouble in connection with such operations.

The judgment appealed against will be varied so as to give effect to the conclusions here stated.

As to the costs, the disposition made by the learned trial Judge of the costs up to and inclusive of the trial should not be disturbed.

Should a reference be necessary in order to determine as to the expenses and allowances to be made to defendant Lawson, the costs of the reference will be reserved.

Plaintiffs should pay to Lawson the general costs of the appeal: all costs of and occasioned by the contentions on which he has failed to be set off.

The other two appeals are dismissed with costs.

OSLER, GARROW, and MACLAREN, JJ.A., concurred.

MEREDITH, J.A., dissented.

ANGLIN, J.

JULY 3RD, 1906.

CHAMBERS.

LIDDIARD v. TORONTO R. W. CO.

Costs—Postponement of Trial—Powers of Judge in Chambers after Trial.

Motion by plaintiffs for costs of postponements of the trial of this action by STREET, J., and TEETZEL, J., respectively.

J. E. Cook, for plaintiffs.

G. B. Strathy, for defendants.

ANGLIN, J.:—The motion is refused, on the ground that there is no jurisdiction in a Judge in Chambers to make the order asked. As to the postponement before Street, J., the material rather indicates that it was his intention that there should be no costs. As to the postponement before Teetzel,

J., these costs could probably have been dealt with either by myself, sitting as trial Judge when the action of the younger plaintiff was finally disposed of, or again at the trial before the Chancellor, when the action of the senior plaintiff was finally tried. Plaintiffs appear not to have asked for these costs upon either occasion. Neither as trial Judge nor as a Judge in Chambers have I now jurisdiction to deal with them. There will be no costs of this application.

CLUTE, J.

JULY 3RD, 1906.

TRIAL.

ALLAN v. McLEAN.

Bankruptcy and Insolvency — Preference — Chattel Mortgage — Actual Advance by Third Person — Money Applied on Debt Due by Insolvent — Creditor's Knowledge of Insolvency — Absence of Knowledge by Third Person.

Action to set aside a chattel mortgage dated 28th March, 1905, made by George R. Levagood to defendant McLean for \$560, as fraudulent and void as against the plaintiff as assignee for the benefit of the creditors of George R. Levagood.

J. J. Drew, Guelph, for plaintiff.

W. M. Douglas, K.C., and J. Watt, Guelph, for defendants the Traders Bank.

N. Jeffrey, Guelph, for defendant McLean.

CLUTE, J.:—. . . The mortgagor, Levagood, came to Guelph in November, 1904, and started a piano business. He made a deposit in defendants' bank on 19th November of \$640, and about 6th December commenced business. By 13th December the account was overdrawn. A discount of \$140 was made on 20th December, but the account was again overdrawn on 3rd January, and so continued until 4th February, when the overdraft was covered by Levagood's note, which was discounted for \$253.70, and towards the end of March there was an overdraft of \$295 and an outstanding note for \$253.70 and interest, making altogether over \$500.

This claim was continually pressed by the manager of the bank, and, about a week or 10 days before the mortgage was given, the manager insisted that the indebtedness must be paid. The manager then applied to defendant McLean to make a loan for Levagood by way of chattel mortgage, and McLean consented to do so if the security was sufficient. Nothing further seems to have taken place except pressure on the part of the bank manager for payment of the claim, until the morning of the day the chattel mortgage was executed. The manager sent for Levagood and insisted upon payment, and Levagood consented to give a chattel mortgage, and the manager then went out to find McLean. He met him at the door of the bank and brought him into his private office, where Levagood then was. It was there arranged that Levagood should give a chattel mortgage upon all his stock in trade and his household furniture, which practically covered all his assets, for the amount of his indebtedness, which was ascertained to be \$560, and that the proceeds of such loan should be paid to the bank. . . . The mortgage was then prepared and there executed. A cheque was then drawn by defendant McLean, marked good by the teller of the bank, and handed to Levagood, who immediately handed the same to the manager of the bank, and it passed to the credit of Levagood's account.

The evidence clearly shewed that . . . that the loan was made at the instance of the bank manager for the express purpose of raising a sum of money to pay off Levagood's indebtedness to the bank; that McLean knew the purpose for which the loan was made; that the whole transaction was carried through at the instance and for the benefit of the bank.

It also appeared that at the time the mortgage was given Levagood was insolvent, and he made an assignment 5 days afterwards—on 3rd April, 1905.

I am satisfied that the manager of the bank had reason to believe, and did believe, that Levagood was in financial straits and was on the eve of insolvency. It does not appear that McLean had this knowledge. He made no inquiry whatever as to the title of Levagood to the property, beyond asking him if there were any liens against it. He allowed himself to be used without question by the bank manager for the purpose of raising this money

to pay off the liability to the bank, at a time when Levagood was insolvent, and when the bank manager had reason to believe that he was in financial difficulties. It is not the ordinary case of a debtor applying for a loan in the usual way and obtaining that loan and making application of it as he sees fit. It was the case, having regard to the whole transaction, where the intent of the parties was that a loan should be made for the special benefit of the bank, and, as I find, with the knowledge that if the loan had been made directly to the bank it would be void under the Act as against creditors.

The question is whether the case falls within *Gibbons v. Wilson*, 17 O. R. 1, or *Burns v. Wilson*, 28 S. C. R. 207. The facts are not identical with either case, but, having regard to the principle upon which I understand *Burns v. Wilson* was decided, I think the present transaction falls within that case.

I find it impossible to say that the advance was made bona fide to Levagood. It was, in fact, made for the bank; at the instance of the bank; at the solicitation of the bank; and it had the necessary effect of defeating and delaying the other creditors.

I think that the transaction cannot stand, and that the chattel mortgage should be declared void as against plaintiff, the assignee for creditors, with costs.

MEREDITH, C.J.

JULY 4TH, 1906.

WEEKLY COURT.

RE KELEHER.

Will—Construction — Devise — Estate — Fee Simple or Life Estate with Executory Devise over—“Die without Lawful Issue”—Death in Lifetime of Testator—Lapsed Devise.

Motion by James Keleher the younger and Timothy Keleher for a summary order determining certain questions arising upon the will of James Keleher the elder.

W. H. Blake, K.C., for the applicants.

W. M. Douglas, K.C., for James C. Keleher.

W. E. Middleton, for Mary Jane Keleher.

MEREDITH, C.J.:—The will of James Keleher is dated 7th June, 1851. The testator died on 7th February, 1855, being the owner of lot 6 in the second concession of division C. in the township of Guelph.

By his will he gave, devised, and bequeathed to his son Denis Keleher his personal property and this lot 6, to have and to hold the lot "to him, the said Denis Keleher, his heirs and assigns forever, subject nevertheless to and charged and chargeable with the annuity or yearly rent charge and other conditions" thereafter "mentioned."

Following this provision are bequests of an annuity to the testator's widow and bequests of pecuniary legacies as well as specific legacies of certain of the personal property of the testator. The pecuniary legacies are made payable by the devisee Denis, and the annuity is charged on the lands devised to him.

Following these bequests is a provision in these words: "I further will and bequeath that in case my said son Denis Keleher shall die without lawful issue of his body, that then and in such case the lands, tenements, hereditaments, and premises hereinbefore given, devised and bequeathed to my said son Denis Keleher, shall be equally divided between my two sons Patrick Keleher and Timothy Keleher hereinbefore mentioned, their heirs and assigns forever, on the terms, charges, payments, and conditions hereinbefore mentioned to be imposed upon my said son Denis Keleher."

Timothy Keleher died in 1852, and Patrick Keleher on 15th January, 1894, and Denis Keleher died in the early part of the present year, without ever having married.

Practically but one question was discussed upon the argument, viz., whether, in the events that have happened, upon the true construction of the will, the devise to Patrick and Timothy Keleher took effect as to both or either of them.

It was contended by Mr. Blake that Denis Keleher took an estate in fee simple with an executory devise in fee to Patrick Keleher and Timothy Keleher in the event of Denis Keleher dying without issue of his body living at his death; and the contention of Mr. Douglas was that Denis Keleher, having survived the testator, took an estate in fee simple absolute.

The success of Mr. Douglas's contention depends upon the reference to the death of Denis Keleher without lawful

issue of his body being held to be to his death in the lifetime of the testator.

The testator having died before 1874, the Wills Act has no application, and it was not disputed that, according to the rules applicable to this will, unless there is something in it to indicate a contrary contention, if the event upon which lot 6 was to go over, happened in the lifetime or after the death of the testator, the estate of Denis Keleher was divested.

Mr. Douglas's argument was that there were in this will indications of such a contrary intention, and that the provision that Patrick and Timothy should take, as the will declares, "on the terms, charges, payments, and conditions hereinbefore mentioned to be imposed upon my said son Denis Keleher," shews that the testator was referring to the death of Denis in his own lifetime. . . .

This argument, though an ingenious one, does not appear to me to be entitled to prevail. What the testator intended to declare by the words upon which reliance is placed as evidencing the contrary intention necessary to displace the general rule, was, I think, that if Patrick and Timothy took the land they should take it subject to the performance of the obligations which he had imposed upon Denis in so far as those obligations had not been discharged; in other words, that the gift to them should not take away the benefit which he intended for his widow and the legatees for whom he had made provision by his will. This seems to be to be a more reasonable view as to his intention than that for which Mr. Douglas argued.

It is to be observed further that where the testator intended to refer to the death in his own lifetime of a beneficiary he used language which plainly shewed that such was his intention. . . .

I come therefore to the conclusion that the reference to the death of Denis is not to his death in the lifetime of the testator.

Having come to this conclusion, it is unnecessary to determine whether the gift over is an executory devise or a remainder in fee after an estate in tail in Denis, which depends upon whether the contingency provided for is an indefinite failure of the issue of Denis or the failure of issue at the death of Denis, for, in the events that have happened, the result would follow in either case.

Patrick, having survived the testator, was, in my opinion, at the time of his death, seised of an estate in fee simple in one undivided half of the land, but Timothy having died in the lifetime of the testator, there was a lapse of the devise to him of the other undivided half, which was therefore undisposed of by the testator and passed to his heirs at law.

If the gift over be an executory devise, the fact that there was a lapse as to the share of Timothy did not operate to prevent the whole estate devised to Denis from being divested upon the happening of the event on which the gift over was to take effect: Theobald on Wills, 5th ed., p. 570, and cases there cited. The gift over in this case was of the whole estate devised to Denis, which Patrick and Timothy were to take in fee simple, and not as in such cases as *Gatenby v. Morgan*, 1 Q. B. D. 685, where the prior estate was a fee simple and the gift over was of a life estate only, to which cases a different rule applies, and the prior estate is divested only so far as is necessary to give effect to the gift over.

There will be a declaration of the rights of the parties in accordance with the opinion I have expressed, and the costs will be paid out of the estate.

MEREDITH, C.J.

JULY 4TH, 1906.

WEEKLY COURT.

RE CHURCH.

Will — Construction — Legacies to Nephews and Nieces and Children of Deceased Nephews and Nieces — Children of Persons Predeceasing Testator—Cumulative Legacies—Deficiency of Assets—Abatement of General Legacies—Residuary Bequest—Persons Entitled to Share.

Motion by the executors of the will of George Church for a summary order determining certain questions arising upon the will.

W. E. Middleton, for the executors and certain beneficiaries.

B. N. Davis, for other beneficiaries.

M. C. Cameron, for infant beneficiaries.

T. N. Phelan, for Joseph Church.

MEREDITH, C.J.:—. . . By his will the testator directed his executors to pay his debts and testamentary expenses, and devised and bequeathed all his real and personal estate to them, upon trust to sell and convert it into money. . . . "and divide and distribute the proceeds as follows: the sum of \$300 to be given to each of my lawful nephews and nieces, and should any of them die before me then their share shall be equally divided between their children living, share and share alike, except my nephew Joseph Church, who is only to be given \$1. The sum of \$300 to be equally divided among the children of Joseph Church by his first wife, share and share alike. The widow daughter of Thomas Church and the widow daughter of Harriett Raymond, whose names and residences I do not know, to be each given the sum of \$450 absolutely. I give and bequeath to the said George Church, of Essex Centre, yeoman, and the said William Church, of the same place, agent, each the full sum of \$450 absolutely. All the rest and residue of my real and personal estate remaining after the said legacies have been paid, I give, devise, and bequeath to the hereinbefore named parties to be divided between them equally, share and share alike.

The "widow daughter of Thomas Church" is Martha A. Poole, and she is a niece of the testator; "the widow daughter of Harriett Raymond" is Nellie Balston, and she also is a niece of the testator, and George Church and William Church are his nephews.

The first question for determination is whether the children of deceased nephews and nieces of the testator who had died before the will was made are entitled to the legacy of \$300 which their respective parents would have been entitled to had they been then living and survived the testator.

I am of opinion that this question must be answered in the negative. The language of the will plainly points to death happening after the will was made and in the lifetime of the testator. "And should any of them die before me" are the words used, and they appear to me to be not capable of being read so as to include those who were at the time dead.

The next question is, whether the legatees Martha A. Poole, Nellie Balston, George Church, and William Church, are respectively entitled to the legacies of \$300 and \$450 mentioned in the will, in other words, whether their legacies are cumulative. I am of opinion that they are cumulative.

The general rule is, that where legacies of unequal amount are given by the same instrument, in the absence of internal evidence of a contrary intention, the legatee is entitled to both. I am unable to find in the language of the testator any such internal evidence, though I have not the slightest doubt that the construction which I am bound to place upon the words which he has used to express his intention is not in accordance with his real wishes.

The next question is, whether all the general legacies must abate pro rata, if the assets are insufficient. I can find nothing in the will to indicate that the testator intended that the general rule that general legatees abate together and proportionally, in case of a deficiency of assets to satisfy them all, should not apply. Mr. Middleton relied upon the word "absolutely" used as to the legacies to Martha A. Poole and Nellie Balston, and the same word and the words "full sum" used as to the legacies to George Church and William Church, as indicating that the testator's intention was that these legacies were not to abate, at all events until after the other legacies had done so. I do not think that this contention is well founded. The words upon which reliance is placed do not, in my opinion, afford any ground for treating them as having the effect contended for.

The next question is as to the persons entitled to the residue.

In my opinion, all those to whom, in the events that have happened, legacies are given, except Joseph Church, share equally in the residue. I include nephews, nieces, children of deceased nephews and nieces, and children of Joseph Church by his first wife.

The last question is, whether Joseph Church is entitled to share in the residue.

I am of opinion that he is not. The testator's intention appears to me to have been that the children of Joseph Church by his first wife should be the recipients of his bounty instead of their father. The language shows that he did not intend that Joseph should benefit to a greater extent than the legacy of \$1 which is bequeathed to him, and the scheme of the will would be defeated if not only the children of Joseph but Joseph himself were to share in the residue.

There will be judgment in accordance with the opinion I have expressed, and the costs of all parties will be paid out of the estate.

CLUTE, J.

JULY 4TH, 1906.

TRIAL.

BROCKLEBANK v. COLWILL.

Private Way—Deed of Grant—Construction—“A Good and Sufficient Roadway not Less than 10 Feet in Width”—Termini and Location—Loss of Right by Abandonment—Extinguishment by Merger—Obstruction—Action for Removal—Damages—Mandatory Order—Costs.

Action to establish a right of way and, to compel defendants to remove obstructions, etc.

W. M. Douglas, K.C., and M. Wilkins, Arthur, for plaintiff.

E. D. Armour, K.C., and J. M. Kearns, for defendants.

CLUTE, J.:—On 2nd December, 1885, one William Henry Drummond was the owner of a piece of land with a frontage of 66 feet 6 inches and a depth of about 200 feet, together with the right to the use of a lane, fronting on George street, in the village of Arthur. On that day he conveyed a portion of the lot, with a frontage of 22 feet and a depth of 90 feet, to Townley Brocklebank, which deed contained the following right of way: “And the party of the first part agrees to give the use of a good and sufficient roadway leading to the rear of the property hereby conveyed, not less than 10 feet in width. On the same day Drummond conveyed to one Skerrit a portion of the land immediately to the east of the land conveyed to Brocklebank, with a frontage of 23 feet on George street and a depth of 80 feet, with a right of way in similar terms to that conveyed . . . to Brocklebank. By several mesne conveyances (the last of which was dated 27th May, 1896), the Skerrit lot was transferred to defendant Gillrie.

On 11th August, 1895, Drummond conveyed to Townley Brocklebank 10 feet in rear of the 90 feet, with a width of 22 feet. On 14th May, 1896, Drummond conveyed to defendant Gillrie the remainder of his lot. On 17th March, 1898, defendant Gillrie by quit claim deed and grant conveyed to David Brocklebank, the plaintiff, 20 feet in rear of the 10

feet with a width of 22 feet, "together with the appurtenances thereto belonging or pertaining."

Townley Brocklebank died on 3rd September, 1897, having first duly made and published his will, whereby he gave to his son, David Brocklebank, "the land and property in the village of Arthur," and on 9th April, 1902, his executor granted and quit-claimed to plaintiff, David Brocklebank, the 100 feet in the village or Arthur, being the 90 feet and 10 feet above mentioned.

In the deed from defendant Gillrie to plaintiff conveying the 20 feet there was also conveyed the party wall on the east side of the Brocklebank lot with a frontage of 16 inches and a depth of 60 feet. . . . Changes had been made in the buildings on each property since 1885. At that time on the Brocklebank lot there stood a small building fronting on George street, 20 by 30, with a small barn to the rear. On the Skerrit lot there was a small building 20 by 40, and on the remaining portion fronting on George street a building 10 by 24.

Within a week or 10 days after the first conveyance to plaintiff's father in 1885, plaintiff commenced business as a hardware merchant on the premises so purchased, and the property has been used for that purpose ever since.

In 1886 the small barn that was upon the 90 feet at the time of the purchase was removed 10 feet to the rear of the 90 feet line, occupying 22 feet in width, and an addition was placed thereto, forming an L along the westerly part of the land adjoining the 90 feet, and leaving an open space next to the 90 feet for the remaining easterly 10 feet. This L-shaped building remained till 1889, when it was torn down. The land then remained vacant for some time. In 1887 plaintiff extended his main building back about 60 feet, and added a brick building, 22 by 30, in 1889. This building, as a matter of fact, extended over the 90 feet by about 3 feet. In 1889 plaintiff erected a stairway at the end of the 90 feet which led up to the door on the second storey. In 1898 plaintiff took down the front buildings and erected a brick front and made one store 90 feet long, and erected a frame store house, 20 by 30, in rear thereof. When the brick building on the 90 feet was first erected there was a door left on the east side at the rear of the lot as well as a door at the north side, through which goods were received, and that continued

there from 1889 to 1898, when it was closed up, and plaintiff then used exclusively the door in the wall on the rear of the 90 feet, and also two doors to the east in the frame store house. . . .

Plaintiff states that he did not take any goods in after the spring of 1886, except at the rear of the lot. . . .

In 1896 the buildings on the Skerrit lot and on the lot to the east thereof were also enlarged, and in 1896 the buildings were extended 100 feet from George street. In 1901 a building was erected on the Skerrit property . . . one storey high and used by defendant Gillrie as part of his store. From the time plaintiff's father purchased, in 1885, plaintiff used the lane and crossed over the property of defendant Gillrie and her predecessors in title to the rear of his 90 feet property. Before the building east of the Skerrit property was erected in 1896, this approach was across the corner where that building now stands; but after the building was erected, which was done without complaint on the part of plaintiff, plaintiff and the occupiers of the Skerrit property went to the north of the building, always using the yard and property of defendants and their predecessors in title for the purpose of approaching their premises with loads and using the yard for turning. There was no dispute as to plaintiff's right to get into his premises by the lane and over defendants' property, but no defined right of way except the lane portion was ever used by either party, the whole yard being used freely by plaintiff for the purpose of his trade and business carried on upon the land in question.

This state of affairs continued until about February, 1905, when defendant Gillrie applied to plaintiff for leave to build upon his wall another storey at the rear of the 90 feet. . . . This plaintiff declined to permit, as it would shut out his light from the upper storey of the adjoining building. Gillrie then asked to build upon the property immediately north. This also plaintiff refused, saying that it would prevent him from getting to his land. . . .

This proposed building . . . extends a little past the 10 feet to the rear of the 90 feet lot owned by plaintiff and would close up the door in the 10 feet if built. Without further reference to plaintiff, defendants proceeded with the building, and also erected a board fence 9 feet high to the north, which would close up the other storey of the frame store

house leading into the 20 feet owned by plaintiff from defendants' premises. The effect of this, of course, was to shut off entirely plaintiff's approach to his property across defendants' premises.

An interim injunction was obtained, but was discontinued . . . upon defendants taking down the 9 feet fence so as to permit plaintiff's entrance to his store house and upon defendants taking the risk of proceeding with the erection of that building.

Plaintiff now asks a mandatory order to remove the buildings and erections which obstruct plaintiff's right of way or interfere with the enjoyment thereof, and to abstain from further interfering with or obstructing the way, and for a declaration establishing plaintiff's right to the use and enjoyment of his right of way, and for damages and other relief.

Defendants answer separately, but in effect deny plaintiff's right of way, and allege that, if any such right ever existed, it was lost by abandonment or extinguishment by merger.

It will be convenient to consider, first, the meaning of the grant of the right of way to plaintiff's father—(a) its termini and (b) its location.

It is plain from the conditions present at the time of the grant, that the right of way was from George street by the lane to the east of the 60 feet. This lane extended for a short distance from George street northerly, leading into the back yard, but beyond about 60 feet the lane was not located on the ground, and until the buildings were extended on the different lots to the rear, the whole yard seems to have been used indiscriminately to reach plaintiff's premises. There was a fence at the rear some 12 feet to the south of where the fence now stands, and which formed an enclosure to the small house at the rear of the property. As the buildings were extended back, this fence was also removed back a short distance to give more room for turning.

The first question is as to whether the lane extended across the way across the rear of the 90 feet and terminated at the westerly boundary, or whether it terminated at the easterly boundary of the 90 feet at the rear thereof.

Mr. Armour supported this last contention, and mentioned the fact that the Skerrit property extended only 80 feet, suggesting that that left 10 feet for the lane to the rear of plaintiff's property. In answer to this it may be said

that the ways granted in both deeds are similar, and, if the contention of Mr. Armour be correct, we should have the curious fact that in one case the grant was to the easterly side of the lot and in the other to the rear, the same words being used in both cases. But, notwithstanding this curious result, I think, having regard to the location upon the ground and the fact that the deeds were executed at the same time, and registered practically at the same time, the Skerrit first, and having regard to the user immediately after and the fact that the door was opened when the brick building was erected within this 10 feet, and chiefly used for many years thereafter and until the additional land was purchased in the rear, I am of opinion that the true construction, evidenced also by user, is that contended for by Mr. Armour, and that there was a substantial compliance with the grant by giving a right of way with one of its termini in the rear of the easterly part of the 90 feet lot, instead of extending all the way across the end thereof.

The next question is as to what the extent of this right of way was. The words are, "a good and sufficient right of way not less than 10 feet wide." Mr. Armour insists that this right of way should leave the lane at right angles, and that it should be limited to 10 feet in width, and that plaintiff is not entitled to turning ground to enable him to get out. . . . Mr. Douglas, on the other hand, contended that a good and sufficient right of way means a right of way sufficient for the purpose of loaded vehicles, and such as would enable them to approach the premises with a full load and turn to get out, and relied upon *Knox v. Sansom*, 25 W. R. 864. . . .

[References to facts and opinions in that case.]

Examining the words in the present grant, the vendor agrees to give "the use of a good and sufficient right of way." The word "good" there, I think, has reference to the condition of the roadway being suitable for the purpose required, and "sufficient" means, I think, broad enough to enable the occupant of the tenement to use the same conveniently. But it is urged that the words "not less than 10 feet" restricted the grant in its entire length to not more than 10 feet, and Mr. Armour relied upon *Westropp v. Commissioners of Public Works*, [1896] 2 Ir. 93. . . . I cannot see that the case is of much use in construing the present grant. He also referred to *Regina v. Scott*, 16 O. R. 454. . . .

It seems to me that the words in the grant "not less than 10 feet wide" were intended not as descriptive of the whole grant, which was to be a right of way good and sufficient, but as indicating that in no part should it be less than 10 feet, and this, to my mind, is very evident from the condition of the premises at the time of the grant. There was a lane leading into the yard, which was then used, and has ever since been used, for an approach to the various occupiers of the premises, and to enable those who entered there to conveniently turn to get out. This yard together with the lane offered good and sufficient right of way to the premises in question. It was not too large for their convenient use. It had been used as such before the grant; it was used as such down to the time this difficulty arose, not only by plaintiff, but by other occupants of the premises, and the meaning of the grant was, I think, to insure this good and sufficient right of way as the means of obtaining access to the land in question. The words "not less than 10 feet" were used as indicating an intention that the lane which was 10 feet leading from George street should be the approach, and that the approach should not be less than the 10 feet. This was good and sufficient for that distance, but it would not be a good and sufficient right of way for the balance of the distance, and, treating the lane and the yard as a right of way intended to be granted, it fully satisfies the words of the grant and the conditions as they existed at the time. The yard was of comparatively small value and of no use except for that purpose. A portion of it was low. This was improved from time to time by defendants. It was filled in and gravelled, and made in fact a good and sufficient right of way, and was, I think, what was intended by the grant.

Mr. Armour contended that having built up the doorway on the east of the wall on the rear of the lot, plaintiff abandoned his right of way—referring to *Bell v. Golding*, 23 A. R. 485. So far from plaintiff intending to abandon the right of way to his premises, his right was never questioned, and the way was constantly used. When the doorway was closed up, he still continued to use the right of way, bringing his goods in and unloading them through the doorway leading into the store house, and thence through another door into the building placed upon the 90 feet lot. Abandonment is a question of intention. The right claimed did not pertain necessarily to the doorway. It was a right of way to the rear

of the lot. "The material inquiry in every case of this kind must be whether there was an intention to renounce the right." Gale on Easements, 7th ed., p. 496.

The mere non-user of a way does not, in the absence of the acquisition of right by the parties in consequence of it, amount to an abandonment. It only raises the inference that there has been no occasion to use it: *Ward v. Ward*, 7 Ex. 789. . . .

[Reference to *Cook v. Mayor of Bath*, L. R. 6 Eq. 177; *Harris v. Flower*, 21 Times L. R. 13; *Bell v. Golding*, 23 A. R. 485.]

Upon the evidence I find as a fact that plaintiff never intended to abandon his right of way, but always claimed the same, and I further find that defendants never made any objection to such claim. It is true that they created a frame building in rear of the Tindale block, which would interfere with the right of way 10 feet wide if it were projected at right angles to the lane from the rear of the 90 feet lot. But, as a matter of fact, the evidence did not establish that the right of way was so located or used or recognized, but that, on the contrary, the yard as a yard was used as a right of way to reach the premises in question. It was really no obstruction to plaintiff's approach to his premises, because in approaching the premises in the most convenient way it was necessary to go to the rear of the yard, and make the approach in the form of a circle, in order to bring the waggon near the place of delivery, and in doing this the building which is said to have formed the obstruction would not be in the way. But, if there were a slight obstruction, the injury to plaintiff was inappreciable, and he did not complain, and all the parties acquiesced in the user of the way, notwithstanding the erection of the building without objection. The fence was moved back for the purpose of giving additional room to turn by reason of the building having encroached on the yard as formerly used, and the authorities are clear that, defendants having placed the obstruction in the way, plaintiff was entitled to use so much more of defendants' land as would be necessary to give him a reasonable use of the right of way. What is a reasonable use is a question of fact. . . .

[Reference to *Hawkins v. Carbines*, 27 L. J. Ex. 44; *Selby v. Bettelfold*, L. R. 9 Ch. 111.]

I am therefore of opinion that defendants have wrongfully interfered with plaintiff's right of way by erecting the building complained of.

But it is further objected on the part of the defence that even admitting plaintiff's claim to the right of way to the 90 feet lot, this does not entitle plaintiff to use the right of way for the adjoining premises subsequently acquired, namely, the 30 feet adjoining, and there is no doubt, I think, that this contention is well founded: *Harris v. Flower*, 21 Times L. R. 13; *Purdom v. Robinson*, 30 S. C. R. 64.

I may further observe that the present is a general right of way to a particular place, to the unrestricted use of which the grantee of the right of way is entitled, and that the grant is not to be restricted to access to the land for the purpose for which access would be required at the time of the grant: *Finch v. Great North Western R. W. Co.*, 5 Ex. D. 254.

Plaintiff has a right to use the way for his business upon the property to which the way appertains, and he is not restricted to the quantum or nature of business carried on at the time of the grant, but he is not entitled to use it as a way to the property adjoining the dominant tenement, namely, the 30 feet.

In the present case plaintiff, as a matter of fact, for many years used the way in question, not only for the 90 feet, but for the adjoining 30 feet, and it is, as his evidence shewed, largely upon the use of the way for the 30 feet that he now insists. To this he has no right . . . and the judgment should be so limited. Whether such right exists under the deeds of the 10 and 20 feet lots, I refrain from considering, as the question was not raised in the pleadings not taken at bar.

A great deal of evidence was given as to the space required for waggons to conveniently turn in, using the right of way. It was shewn that the waggons ordinarily used were about from 23 to 25 feet in length, and I think the judgment in this respect, following *Knox v. Sansom*, will do substantial justice in declaring that the right of way which was granted included the right to turn waggons not exceeding 25 feet in length for the purpose of them backing to the place of delivery or leaving the premises.

This is a case where I think a part of plaintiff's claim may be compensated in damages. It fills the requirements

of what is called a good working rule, that the injury to plaintiff is small and one which is capable of being estimated in money and which can be adequately compensated by a small money payment. The case is one in which it would be somewhat oppressive to grant the injunction in its full measure, notwithstanding the risk assumed by defendants in completing the building after notice. I therefore give defendants a right, instead of removing the building they have erected, to allow the same to remain, plaintiff to have the right to use the way as heretofore up to the line of the building, and that the right of way shall be freely used, not only for the 90 feet, but for the whole 120 feet. Doubtless plaintiff will suffer some slight inconvenience by closing the door through which he now receives goods, but from the evidence I am satisfied that the inconvenience will be very slight, and that it has been more than compensated for by his having heretofore used the right of way in question for the 30 feet as well as for the 90 feet lot. Defendants are to signify their election within 30 days; otherwise the mandatory order to go for the removal of the building, and in that case the order is to contain a clause limiting the use of the way to the 90 feet as used heretofore.

I do not think there should be any order as to costs. Plaintiff claimed more than he was entitled to by insisting that he had the right to use the way for the 30 feet lot . . . Defendants denied that plaintiff was entitled to any right of way. Each having succeeded in part and failed in part, there should be no costs.

MABEE, J.

JULY 5TH, 1906.

WEEKLY COURT.

RE SINCLAIR AND TOWN OF OWEN SOUND.

Municipal Corporations—Local Option By-law—Motion to Quash—Vote of Ratepayers—Town Divided into Wards—Right of Persons Owning Property in Different Wards to Vote more than once—Voters Deprived of Right—Confusion from Colour of Ballot Papers—Persons Voting without Right—Irregularities in Voting—Effect on Result—Municipal Act, sec. 204.

Motion to quash a local option by-law of the town of Owen Sound.

W. Nesbitt, K.C., J. Haverson, K.C., and W. H. Wright
Owen Sound, for the applicant.

A. G. MacKay, K.C., and E. E. A. DuVernet, for the
town corporation.

MABEE, J.:—On 1st January, 1906, a local option by-law
was submitted to the electors in Owen Sound, and there were
2,000 votes recorded as having been cast, 1,238 in favour and
762 against the by-law, which was therefore declared carried
by a majority of 476.

Upon well-established practice, based upon a long line
of authorities, the Courts do not interfere with this pre-
ponderating will of the electors except for the clearest and
plainest reasons. . . .

The first ground was that the by-law was not "duly ap-
proved of" by the electors of Owen Sound, in that the rate-
payers in the different wards were not allowed to vote upon
the by-law in the different wards where their names appeared
upon the voters' lists. It appears that in Owen Sound there
are 257 persons rated for property in more than one ward,
and these persons have a total of 573 votes among them-
selves, and the above objection deals with this class of voters, those
who were promoting the by-law contending that this class
could only vote once upon this by-law; and, appended to
large poster, over the signature of the town clerk, is the fol-
lowing notice: "Electors are hereby notified that in the com-
ing municipal elections, electors who desire to vote for
candidates for mayor or councillors, or for the local option
by-law, must vote in the polling subdivisions in which they
reside, and there only; and if not qualified to vote in the pol-
ling subdivision in which they reside, then at the polling
subdivision where they first vote, and there only, excepting
for school trustees and by-laws creating a debt. But for the
said school trustees and by-laws creating a debt they may vote
in every ward in which their names appear on the voter
list. 'Any person who votes more often than he is entitled
to under the provisions of this Act shall incur a penalty of
\$50.' Sec. 162, par. (1), ch. 19, Consolidated Municipal
Act."

It was not suggested that there is any authority in the Act
for giving a notice of this sort, and it seems to have been

matter under discussion prior to the vote, . . . whether property owners had the right to vote in each ward where their names appeared upon the lists; those advancing the interest of the by-law, it is said, being advised one way and those opposed being advised the other way. The town clerk was a friend of the by-law, and having issued a notice like the above without any legal authority for so doing, it may not be unfair to assume that the friends of the by-law had feelings of distrust as to the property-owners' vote. All the deputy returning officers were notified by the clerk to refuse ballots to any voter who had voted upon this by-law in another ward. In order that no injustice should be done to the clerk, it should be stated that he was acting upon the advice of solicitors . . . and no bad faith is imputed to him.

It is then necessary to consider which side was right upon this contention.

Sec. 141 of R. S. O. 1897 ch. 245 provides that "local option" by-laws, before being finally passed by the council, must be "duly approved of by the electors of the municipality in the manner provided by the sections in that behalf of the Municipal Act." Turning to the Consolidated Municipal Act of 1903 (3 Edw. VII. ch. 19), secs. 338 to 374 are those that provide for the assent of electors being obtained to municipal by-laws, sec. 355 providing that where a municipality is divided into wards each ratepayer shall be so entitled to vote in each ward in which he has the qualification necessary to entitle him to vote on the by-law. It was contended by counsel for the respondents that sec. 355 did not apply, as Owen Sound is not divided into wards, and he relied for this upon by-law No. 853 enacted in 1898; but this by-law does not abolish the wards in the town, and merely provides that the council shall be composed of a mayor and one alderman for each one thousand of the population to be elected from general vote. The clerk says there are 4 wards, Bay, Centre, River, and West, and that all money by-laws since he has been clerk have been voted upon in the different wards; the notice above adverted to recognizes the existence of wards. The original Act of incorporation, 19 Vict. ch. 18, sec. 4, makes provision for the town being divided into 3 wards, and it is said this was increased to 4 in 1889. I

think these continue to exist, and that Owen Sound is divided into wards within . . . sec. 355.

It was then contended that sec. 355 had relation only to the class of by-laws mentioned in secs. 353 and 354, that is, by-laws for "contracting a debt," or more commonly spoken of as money by-laws. These sections appear in their present form in 1903, as pointed out in *Re Dillon and Village of Cardinal*, 10 O. L. R. at p. 374. "The sections in that behalf in the Municipal Act," that is, the sections providing for the assent of electors to by-laws before being finally passed by the council, referred to in the local option section, 141, are these sections 338 to 374, and they all apply as far as may be necessary to work out the intent of the legislature, and I am of the opinion that sec. 355 must also be read as applicable to a vote upon a by-law of this character, and that each ratepayer had a right to vote in each ward in which his name appeared upon the voters' list.

If this is the proper conclusion upon this point, then what position does this by-law stand in? The persons whose names appeared upon the voters' list in more than one ward were persons owning property in more than one ward. The property owners may be those most interested in a by-law of this nature, and we have, during the progress of the election, a notice, having the official authority of the clerk, that this branch of the electorate will render themselves subject to penalties if they exercise their rights of voting in the way I think the law entitled them. If necessary one might speculate in various ways how this might "affect the result of the election." I think the applicant is entitled upon this motion to have it taken for granted that all the members of the class of persons struck at by this notice would have voted against the by-law, and therefore 316 votes against the by-law were prevented from being polled. It was contended that there was nothing to shew that any of the 573 voted, and that this alone disposed of the majority in favour of the by-law. If this is so, the by-law must clearly be set aside. On the other hand, if the 257 are assumed to have voted, then the majority of 476 is reduced to 160.

Then it is shewn by the applicant that over 100 votes were polled by persons who had for various reasons no right whatever to vote. It was contended this was not open for consideration upon this motion. This point has been discussed

in *Re Salter and Township of Beckwith*, 4 O. L. R. 51, 1 O. W. R. 266; *Re Coe and Township of Pickering*, 24 U. C. R. 439; and in *Re Dillon and Village of Cardinal*, 10 O. L. R. at p. 375, 5 O. W. R. 653, 750. I have no doubt that the fact of persons voting who had no right to vote is an element for the consideration of the Court upon a motion to quash. It may not, standing alone, be sufficient, except in a very extreme case. Of course the sections relating to scrutiny have nothing to do with this feature of the case, but, to my mind, it is one of the matters that must be considered in determining whether the voting "was conducted in accordance with the principles laid down in this Act:" see sec. 204. It is not known how these votes went, although it appears that some at least who had no votes not only voted but were very energetically supporting the by-law. So it is not possible to say that they should not be deducted from the 160 left, thus reducing the majority to below 60.

It seems to me, however, that this motion should not be disposed of as to the point under consideration upon the ground of speculating in figures. The passing of this by-law by the council is one very materially affecting the people of Owen Sound. It should be before the electors for their sanction in a manner perfectly fair to the interests of both sides; let any amount of argument and appeal to reason be advanced by the opposing factions, and upon a fair vote let the result stand. Section 204 makes the widest possible provision for non-interference by the Court for non-compliance with the provisions of the Act as to taking the poll or counting the votes, or by reason of any irregularity, if it appears that the election was conducted in accordance with the principles of the Act, and that the mistake or irregularity did not affect the result. Is an election conducted in accordance with the principles of the Act when, let it be by ever so innocent a mistake, a large class of the electorate, and very possibly those, from a property point of view, the most interested in the vote, have practically a threat of prosecution pointed at them if they exercise their franchise? I think not. To my mind it is utterly opposed to everything that is fair, and is not at all in accordance with the principles of the Act. Then, how can it be said this did not affect the result, even regarding it as a mistake or irregularity? It was done for some object; the statute did not require it; it is not unfair to assume that it was intended to affect the result; who can say what the

result would have been had it been known beforehand by this class of voters that they could poll among themselves alone 316 more votes? I think it did affect the result.

I do not think, however, that sec. 204 can be invoked in favour of the by-law, as I do not think this is the sort of mistake or irregularity that that section is directed at. The free exercise of the franchise by the voter is the corner-stone of the election law, and I do not think the class of electors intended to be affected by this notice were left free to vote as they had the right to do. It is shewn that the instructions to the deputies were carried out and ballots refused to them in wards where they had the right, as I think, to vote, and I think this first objection standing alone is fatal to the by-law.

The next serious point in this matter is the alleged confusion that arose by reason of the colour of the ballots that were used upon this vote. A by-law authorizing the loan of \$25,000 to the Keenan Woodenware Company was being submitted to the electors at the same election, and upon these two by-laws coloured ballots were used, for the local option by-law a bright red ballot, and for the Keenan by-law a pinkish red. Frederick W. Lyons, who was a scrutineer in division No. 8 Centre ward and 8 Bay ward, says that during the day at his booth voters had a great deal of difficulty in distinguishing between these ballots, and that they frequently returned to the deputy returning officer to have pointed out to them which was the local option and which the Keenan by-law, and that he believes some voted for the local option by-law believing they were voting for the Keenan by-law. Joseph P. Raven, a banker, says that while he was present at this same poll a clergyman, who had stated his intention of voting for the Keenan by-law and against the local option by-law, voted for the latter by-law, mistaking the ballot used, and that it was not until he was returning his ballots to the deputy that he discovered his mistake, whereupon he spoiled his ballot and received a new one. Mr. Raven further states that from what was stated by several voters at the poll, and from the difficulty he himself had in distinguishing the ballots used from their similarity in size, colour, and the printed matter, he believes several persons at this poll voted for local option who intended to vote against it. Nelson Lefflar was the deputy at this poll, and makes an affidavit in which he states that "in two or three instances I was asked

which was the local option by-law, and in two or three instances which was the Keenan by-law, but this only occurred at the time I was handing out the ballots, and before the parties had an opportunity of reading what was written thereon, and arose, I understood, from the unusual number of ballots and large number of candidates. In no instance, to the best of my recollection, did any voter return from the polling compartments to ask me for such information or anything in relation thereto." He does not notice the affidavit made by Mr. Raven. Many affidavits are filed stating that the various deponents heard of no confusion owing to the similarity of these ballots. I am of opinion that, owing to their similarity in colour, in size and form, . . . the very greatest confusion was likely to arise and did arise. It is true that errors were just as likely to cut one way as the other, and the friends of the by-law were as likely to lose as to gain by reason of mistakes of voters, but this is no answer to the objection. Voters should not be subjected to this sort of confusion; there is no reason why these ballots should have been in such form, colour, and size as to open the door to error; and if a clergyman and banker found difficulty, and the former actually fell into error, and would have been made to vote in a way he did not intend had he not discovered the mistake at the last moment, where may this confusion not have extended among less intelligent and illiterate voters? I think, in view of the greatly reduced majority this by-law must be regarded as having been carried by, if the bad votes are discarded and the votes in different wards added, the confusion arising over these ballots may have affected the result.

The applicant complains of many irregularities connected with this vote, and certainly very many existed. I do not propose dealing with them in detail, as, in my view, the by-law must be set aside upon the grounds already indicated, and most, if not all, of these irregularities would fall within sec. 204. The clerk himself in his examination for discovery says: "The voters' lists used were all mixed up. . . . There has been no revision the last two years. . . . We had two or three elections when the lists were used, and we had to put in a heap of things, and they got all mixed up."

The clerk entirely omitted to comply with the provisions of secs. 152 and 348 of the Consolidated Municipal Act of

1903, but, instead thereof, he seems to have furnished each of the deputies with a large printed column intituled "Voters' Lists of the Town of Owen Sound;" and on the back he wrote the following: "December 26th, 1905. I solemnly declare that this is a true copy of the last revised voters' list. Chas. Gordon, clerk."

Many irregularities are attributable to the carelessness of the deputy returning officers; one instance will suffice. James Buchan was deputy returning officer in No. 10, and Joseph Millburn, poll clerk; the deputy certified that all the entries required by law to be made had been made in the poll book. There were 267 votes recorded at this poll, yet the poll book does not shew that a single voter voted upon either of these by-laws. All the columns provided in the book for shewing the voters voting for mayor, alderman, school trustee, by-law 1172, by-law 1178, plebiscite, are blank.

Many declarations that should have been attached to the books filed upon this motion are missing, and it is suggested they were put in the ballot boxes instead and were all destroyed with the ballots on 24th April.

Very many glaring omissions and irregularities appear in connection with the proceedings upon this vote, leading to the irresistible conclusion that the election officials were selected without regard to fitness, or they exhibited a lack of attention to legal requirements most difficult to understand. These remarks of course do not apply to all connected with the election, but unfortunately to many of them.

I think the by-law must be quashed with costs to be paid by the town corporation to the applicant.

The following authorities were referred to upon the argument: *Re Cartwright and Town of Napanee*, 11 O. L. R. 69, 6 O. W. R. 773; *Re Pounder and Village of Winchester*, 19 A. R. 684; *Re St. Louis and Reaume*, 26 O. R. 460; *Re Young and Binbrook*, 31 O. R. 108; *Re Salter and Beckwith*, 4 O. L. R. 51; *Re Pickett and Wainfleet*, 28 O. R. 464; *Re Dillon and Village of Cardinal*, 10 O. L. R. 371, 5 O. W. R. 653, 750; *Re Vandyke and Village of Grimsby*, 7 O. W. R. 739; *Re Kelly*, 3 O. W. R. 765; *Re Huson and South Norwich*, 21 S. C. R. 677; *Re Tolmie and Campbell*, 1 O. W. R. 268.

BRITTON, J.

JULY 6TH, 1906.

TRIAL.

GREEN v. GEORGE.

Judgment—Issue as to Validity of Default Judgment—Motion to Set aside Judgment after 15 Years—Personal Service of Writ of Summons—Misrepresentation as to Service—Agreement to Give Time for Payment of Claim Sued for—Form of Judgment — Special Indorsement of Writ — Price of Goods Sold — Interest — Judgment Set aside — Terms — Merits—Costs.

On 30th July, 1889, William George began an action by the issue of a writ of summons against P. J. Green. On 6th October, 1890, judgment was signed against Green for default of appearance for \$2,411.84 debt and \$23.63 taxed costs.

No execution issued at the time of signing judgment, nor were there any further proceedings then taken against the judgment debtor.

William George died on 29th September, 1904, and Mary George, his widow, obtained letters of administration to his estate. On 20th January, 1906, Mary George as administratrix obtained an order directing that the action be continued in her name as plaintiff against P. J. Green as defendant.

On 25th January, 1906, an order was obtained for the issue of an execution on the judgment, notwithstanding that six years had elapsed since the judgment. Execution was issued, and a seizure was made thereunder. The sheriff of the district of Nipissing was appointed receiver to get in and receive any money coming to Green from or in respect of his interest in the south-east quarter of the north half of lot 14 in the 1st concession of Bucke, in the district of Nipissing, to the extent of plaintiff's judgment and costs.

Green applied to the Master in Chambers to set aside the writ of execution, the receiving order, the order of revivor, and the judgment, upon the following, among other, grounds, viz.:—

1. That he was never served with the writ of summons.
2. That judgment was never signed and entered.

3. That the judgment, if signed, was obtained by misrepresentation as to the service of the writ of summons.

4. That the order of 25th January, 1906, was made *ex parte*.

5. That he had a good defence to the action on the merits.

Upon the return of the motion the Master directed an issue to be tried. In the issue P. J. Green was made plaintiff, and Mary George, administratrix, defendant, and the issue was "whether or not the said P. J. Green is entitled to have the alleged judgment in this action set aside and vacated."

This issue was tried before BRITTON, J., at Pembroke.

W. R. White, K.C., and J. G. Forgie, Pembroke, for plaintiff in issue.

C. Millar and C. McCrea, Sudbury, for defendant in issue.

BRITTON, J.:—At the close of the evidence and argument I found the facts as follows:

1. The writ of summons, specially indorsed in form, was personally served . . . upon Green on 31st July, 1890.

2. That the alleged agreement on the part of George to give time to Green until he could pay the amount which Green owed to the firm of George and Green, and which Green assumed at the time of the dissolution of the partnership, provided only that Green would pay in instalments of not less than \$25 a month, was not proved. . . .

I now deal with the points reserved:

1. Objection that judgment was never signed and entered herein.

Mr. Williams, a student in the office of the solicitors for George, on 6th October, 1890, attended at the office of the local registrar at Pembroke, searched for an appearance, and, finding none, made an affidavit of non-appearance, filed it together with a bill of costs, which the local registrar taxed, and the original writ of summons, with an affidavit of personal service of a copy of it. And there was then written out the form of judgment as follows:

(Style of cause.)

"The 6th day of October, A.D. 1890. The defendant not having appeared to the writ of summons herein, it is this day adjudged that the plaintiff recover against the said defendant \$2,411.84 and \$23.63 costs."

The local registrar did not on that day sign this paper on its face, but it was properly stamped, and indorsed upon it are the words:

"Minute of judgment. Judgment signed 6th October, 1890." And this indorsement was duly signed "Arch. Thomson, L.R., H.C.J."

Mr. Thomson also indorsed this paper, "Received and filed this 6th day of October, 1890. Arch. Thomson, Clerk."

On the following day a memorandum was made by Mr. Thomson in the judgment book in his office, and in that book Mr. Thomson signed the entry, and then upon the paper above mentioned, on the margin, Mr. Thomson wrote "Entered in Liber C. folio 123, Oct. 7, 1890;" and he signed "A. T., L. R."

I am of opinion that what was done in this case was a substantial compliance with Rules 764 and 775 of the Consolidated Rules of 1888.

I find that there was no misrepresentation as to the service of the writ. It may be that Mr. Green's recollection as to service of writ is not accurate because of his supposing, if he did so suppose, that having made an assignment for the benefit of his creditors—having made a complete surrender—nothing more could be done in the action George had instituted. Mr. Green does not suggest this, nor does he say that there was any understanding or agreement with Mr. Delahaye as a consideration for making the assignment. It appears that shortly after the assignment, Mr. George was willing to accept 25 cents on the dollar in full settlement, so I infer that at that time Mr. George was not very anxious to get a judgment, and that Mr. Green was not very anxious to prevent a judgment going.

Mr. Green—plaintiff in the issue—urged upon the trial the further objection that the judgment by default could not stand, because the writ was not properly specially indorsed. Was this writ specially indorsed so as to entitle plaintiff to sign final judgment by default in case of non-appearance? The point presents considerable difficulty. I have looked at a great many cases—those collected by Mr. Middleton in his

instructive article in 13 C. L. T. 66, and others, and, not without some measure of doubt, I have reached the conclusion that the indorsement under consideration was not sufficient.

The writ was indorsed as follows: "The plaintiff's claim is for the price of goods sold and delivered by the plaintiff to the defendant, the account for which goods has been stated between the plaintiff and the defendant. The following are the particulars:—

" April 4, 1890. To balance due the plaintiff on an account for goods sold and delivered by him to the defendant, and which account has been rendered by the plaintiff to the defendant and admitted by him to be correct and stated between them, and which balance of account has also been rendered by the plaintiff to the defendant and admitted to be correct, and stated at the sum of	\$2,389 46
July 29, To int. for 3 5/6 months at 6 per cent..	45 79
	<hr/>
	\$2,435 25

Cr.

April 19. By cash	\$50 00
July 29. " int. for 3 1/3 months at 6%	83
	<hr/>
	50 83
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	\$2,384 42

" And the sum of \$50 for costs, and if the amount claimed be paid to the plaintiff or his solicitors within eight days from the service hereof, further proceedings will be stayed."

This writ was issued on 30th July, 1890, so proceedings are governed by Rule 245 of the Consolidated Rules of 1888. There were 4 classes of matter for which there would, then, be special indorsement, where the claim was for debt or liquidated demand, with or without interest, arising upon a contract, express or implied, as for instance:

(1) Upon bill or note or cheque or other simple contract debt, or

(2) On bond or contract under seal for payment of a liquidated amount of money, or

(3) On a statute when the sum sought is a fixed sum or in the nature of a debt, or

(4) On a guaranty, whether under seal or not, where the claim against the principal is in respect of such debt or liquidated demand, etc.

This claim is for a debt or liquidated demand, so far as the indorsement alleges an account admitted by the defendant, and stated between the parties at the sum of \$2,389.46. The claim for interest on this amount is not, under the authorities, shewn to be properly the subject of special indorsement. It is not alleged that upon the account as rendered there was any claim for interest, or that interest was in any way demanded, or that defendant would be charged with interest, or that he promised to pay interest. Nothing is set out or stated from which a promise to pay interest can be implied. . . .

[Reference to *Rodway v. Lucas*, 10 Ex. 667; *Huffman v. Doner*, 12 P. R. 492; *Hay v. Johnston*, 12 P. R. 596; *MacKenzie v. Ross*, 14 P. R. 299; *Hollender v. Ffoulkes*, 16 P. R. 175; *Sheba Gold Mining Co. v. Trubshawe*, [1892] 1 Q. B. 674; *Wilks v. Wood*, ib. 684; *Gold Ores Reduction Co. v. Parr*, [1892] 2 Q. B. 14; *Munro v. Pike*, 15 P. R. 164; *Solmes v. Stafford*, 16 P. R. 78, 264; *McVicar v. McLaughlin*, 16 P. R. 450; *Clarkson v. Dwan*, 17 P. R. 92; *Appleby v. Turner*, 19 P. R. 145; *Anlaby v. Prætorius*, 20 Q. B. D. 764; *Smurthwaite v. Hannay*, [1894] A. C. 501.]

Since the cases above cited Rule 603 has been amended by the addition thereto of sec. 3, permitting, upon motion for judgment, any amendment of the writ which might be ordered on a substantive motion.

That does not assist in the present case, where defendant has not appeared. Where an appearance has been entered, the defendant can always resist summary judgment if the writ was really not properly specially indorsed, or if there is reasonable ground for disputing the claim.

In this case there was nothing proved that would entitle George as of right to interest. There was no express or implied promise to pay interest.

The \$2,389.46 as indorsed on writ was made up as follows:—

George and Green partnership account, August 22,		
1889	\$2,672 07	
Certain items down to November 19, 1889	23 10	
Interest to November 19, 1889	61 00	
		<hr/>
	\$2,756 17	
Less cash	\$246 25	
Account	7 20	
		<hr/>
	253 45	
		<hr/>
	\$2,502 72	
April 4, 1890, 3 months' interest	37 51	
		<hr/>
	\$2,540 26	
Less cash	\$150 00	
Interest	80	
		<hr/>
	150 00	
		<hr/>
	\$2,389 46	

The beginning of the account was the partnership debt of George & Green to George of \$2,672.07. It was not shewn that there was any promise to pay interest on that, nor did it appear that Green knew of the account being increased in amount by the large charges for interest. Merely upon the question of Green's want of knowledge of or indifference to the amount of the claim, it may be noted that, although Green got credit by indorsement on the writ for the \$50 paid on 19th April, 1890, and although this same credit was given on the account filed with the assignee, he, by error, omitted the credit in his statement of claim, and George's claim was placed upon the notice to creditors at \$2,435.61.

Upon the whole case I am constrained to hold that plaintiff in the issue is upon terms entitled to have the judgment set aside and vacated.

Upon the trial the merits were gone into, and I found, although perhaps not necessary for disposing of points reserved, that plaintiff in the issue was, when the writ of summons issued, indebted to the late William George in the amount claimed apart from interest. The judgment should be set aside only upon such terms as will be a fair and just protection to defendant in the issue.

It would be a great injustice to defendant in the issue not to impose terms. The facts are altogether exceptional. In allowing plaintiff in the issue costs to the extent I do, the imposition of terms is in my power; and, even without that, it is, in my opinion, in my power in this case to do so, and if wrong it must be for an appellate Court to so say. The terms are that an appearance shall be entered by the plaintiff in the issue within 10 days, and that all necessary time shall be extended to defendant in the issue for proceeding with that action. She shall have two weeks from the entry of appearance for the delivery of the statement of claim. The action shall be tried without either party, so far as the Court can prevent it, being prejudiced by the delay. The receiving order will stand, and the receiver will be continued, and the money will remain in his hands for the settlement of such claim as Mary George, administratrix, may establish in the action. Plaintiff in the issue is to get costs of the motion to set aside the judgment to be taxed, and costs of the issue and trial of the issue, which I fix at \$100. Plaintiff in the issue set up that the writ was not personally served, and made contentions not established, so that he is not entitled to all the costs of that issue. These costs are to be set off against such claim as the defendant in the issue may establish. The costs of the action and the trial of it are reserved, and may be disposed of by the trial Judge. If these terms are not accepted by plaintiff in the issue, judgment will be entered for defendant in the issue without costs.

TEETZEL, J.

JULY 7TH, 1906.

TRIAL.

CANADIAN PACIFIC R. W. CO. v. GRAND TRUNK
R. W. CO.

Specific Performance—Contract to Divide Specified Land to be Acquired by Defendants — Acquisition by Defendants of Part only—Claim of Plaintiffs to Half of Land Actually Acquired—Right to Less than Half with Abatement in Price.

Action for specific performance of an agreement to divide certain lands.

E. D. Armour, K.C., for plaintiffs.

M. K. Cowan, K.C., for defendants.

TEETZEL, J.:—In 1901 the Ontario government was proposing to sell a tract of land lying between the tracks of plaintiffs' and defendants' railways and east of Pacific avenue in the city of Toronto. The situation of the property made it of special value to each of the two companies for shunting and storage grounds, and the officers of both companies were desirous of acquiring the whole or a portion of the property.

With a view of preventing competition between the two companies as purchasers, an arrangement was entered into as set forth in a letter from Mr. McNichol, vice-president of plaintiff company, to Mr. Wainwright, . . . controller of defendant company, dated 1st June, 1901, as follows:—"As per conversation to-day, we will make no attempt to acquire the land in question, the understanding being, however, that we will have the right to purchase from you the half of such land surrounded green on the enclosed blue print which I have initialled, any time within 5 years from this

date, for one-half the amount you pay for the land in question, plus 5 per cent. per annum."

This proposition was accepted by Mr. Wainwright, but no formal agreement was ever entered into by either of the companies.

The blue print plan referred to in Mr. McNichol's proposition shewed the whole property to be triangular in shape, and "the half of such land surrounded green." . . . to be the northerly half adjoining plaintiffs' railway.

The government withdrew from sale a portion of the land situate at the north-west angle, which I should estimate . . . at about 2 acres, thus reducing to that extent the area of the portion proposed to be acquired by plaintiffs.

Plaintiffs contend that under the agreement they are entitled to a conveyance of the northerly half of the land actually acquired by defendants, and are not limited to the remainder of the northerly half of the original triangle with an abatement from the purchase price, and in this action claim judgment for an equal division of the land acquired by defendants and specific performance by a conveyance of the northerly half.

In order to obtain this equal division it is necessary to throw the dividing line indicated on the blue print further south, in order to take in sufficient extra land to compensate for the loss occasioned by the withdrawn portion. The parties neglected to make provision for any such contingency.

In the conveyance tendered for execution and in the statement of claim there is included a portion of land in respect of which no agreement was made giving plaintiffs any right or interest therein, nor is there any agreement entitling plaintiffs to a declaration that they are jointly interested with defendants in the whole property. The agreement was limited in its terms to specific property, and of course cannot be enlarged by the Court.

For this reason, and without determining whether the agreement was for any purpose binding upon defendants as a railway corporation, I think plaintiffs' action fails and must be dismissed with costs, but without prejudice to any action which plaintiffs may be advised to bring in respect of the remainder only of the northerly half of the original triangle, with an abatement of the purchase price.

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ONTARIO WEEKLY REPORTER

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VOL. VIII. TORONTO, SEPTEMBER 6, 1906. No. 6

MABEE, J.

JUNE 11TH. 1906.

TRIAL.

LUDGATE v. CITY OF OTTAWA.

*Highway—Non-repair—Injury to Pedestrian—Snow and Ice
—Notice to Municipal Corporation—Gross Negligence—
Damages.*

Action by Hannah Ludgate to recover \$2,000 damages for personal injuries.

The plaintiff alleged that in the afternoon of the 19th March, 1906, she was walking westward on the south side of Albert street, between O'Connor and Bank streets, in the city of Ottawa, when, owing to the want of repair, slippery, uneven, and dangerous condition of the sidewalk, she fell, broke her arm, and sustained other serious injuries; that the injuries were caused by the gross negligence of the defendants, their servants and agents, in wilfully allowing that portion of the street in question to become and remain out of repair and in a dangerous condition for pedestrians.

The defendants denied the allegations of the plaintiff and charged that the plaintiff's injury, if any, was due to her own negligence and want of care, and that by the exercise of ordinary care and caution she might have avoided the injury.

The action was tried before MABEE, J., without a jury, at Ottawa.

D'Arcy Scott, Ottawa, for plaintiff.

Taylor McVeity, Ottawa, for defendants.

MABEE, J.:—I think in this case the plaintiff has established liability against the defendants.

The facts are not seriously in dispute. The statement of them given by the witnesses called on behalf of the defendants does not materially differ from the statements given by these ladies who have testified, along with the plaintiff, upon her behalf.

It seems that last winter was an extremely mild one, and very little snow fell. That is, of course, material, because what might be negligence under one set of weather conditions, at a certain season of the year, might be no evidence whatever of negligence under another set of weather conditions, at some other season of the year.

It is in evidence that for some 10 or 12 days previous to the occurrences that led to this litigation, there had been no snow fall at all, and apparently no drip from adjacent eaves that reasonably could have been said to have been the cause of this elevation that existed upon this walk. The witnesses have agreed in the main as to the location of it and the extent that it covered the surface of the pavement. The plaintiff was under the impression that it was some 6 inches higher on the inside; Mrs. Starrs says about the same height, some 6 inches; "there was a slope from 6 inches down to almost nothing."

Mrs. Mills says she thinks it was 6 or 7. Mrs. Agar agrees with Mrs. Mills in saying some 6 or 7 inches high.

Mrs. Hutchison does not speak of the height, but she mentions the slant, the extent of time it had been there, and Frederick Mills speaks in the same way.

It is shewn by these witnesses, or some of them, that during the course of 3 or 4 weeks before this accident some three or four others had fallen at the point in question or in the immediate vicinity.

Then on behalf of defendants, the street foreman had made no particular examination of this walk; he was not sure whether he had passed over it on foot; he had driven along the street, and driving past he noticed there was ice upon the pavement. He was under the impression it was only 2 or 3 inches in thickness.

Mr. Finlay, the ward foreman, was aware the walk was in the condition described by the witnesses for plaintiff, and Mr. Finlay's evidence in the main does not disagree with that of plaintiff and those called by her.

He says that about a foot on the outside of the walk was bare. That agrees with the statements made by one of the ladies that she had been accustomed to walk along on the outside edge, because that was the only place she could proceed with any reasonable degree of safety. Then Mr. Finlay thinks that the ice was some 2 or 3 inches thick on the inside of the walk, and it sloped down towards the middle. He says there might have been places where it was thicker than 3 inches. That is not at all contradictory of the statements made upon plaintiff's side of the case, that it ran up to 6 and possibly 7 inches in height.

We have it shewn that this condition existed for 3 or 4 weeks previous to the accident, without any reason being given why this ice could not have been removed.

The case does not strike me as being at all similar in its facts with *Mahoney v. City of Ottawa*, decided by my learned brother Teetzel, and reported in 3 O. W. R. 695. That case is, I think, distinguishable upon its facts, and the only assistance one derives from the cases in matters of this sort is where the facts can be said to be largely identical. I think that the existence of this elevation for the length of time shewn here, during a mild winter, with the appliances used by the city for the removal of just such dangers as this, may be said to be gross negligence. No reason is shewn for the non-removal, nothing appears in evidence that would lead one to think it would have been unreasonable to expect the city to remove it; it is in a populous section of the city, much travelled, within half a dozen doors of one of the most travelled streets of the city; it remained there for the length of time I have mentioned. As to the knowledge of its existence (although that is not even necessary in this case), its presence appears to have been known by those whose duty it would seem to me to be, under the law, to have seen that it was removed. On all these facts I think the conclusion is irresistible that plaintiff has brought defendants within the section which makes them liable in actions of this sort.

I am dealing only with the point at which the accident occurred. I have no concern about the block from one end to the other, or any other block or blocks in the city. I am dealing distinctly with this particular location, 204-206 on the south side of Albert street.

Then as to the question of damages, the plaintiff's injury, fortunately, was not very serious. She is a lady in humble

station, earning only some \$11 a month. She says that she lost \$16.50 by reason of her being laid up with the accident and she paid \$21.50 for board; the doctor's bill \$45; \$5 for a nurse, and \$1.80 for medicine: making a total out of pocket expenditure of \$89.80.

Then, one of the bones of her wrist was broken; she apparently has had a good recovery. There is, doubtless, some permanent stiffness, but to all intents and purposes Dowling says it is practically, for working, as good as even although doubtless she does, as she says, suffer some inconvenience. The doctor said that the break would cause considerable pain, and doubtless she did suffer, as we know all people do who receive injuries of that character. But fortunately there is no permanent injury other than possibly some little inconvenience. I think, under the circumstances, the assessment for pain and suffering and other loss of sufficient sum to make the whole compensation \$250 would not be unfair to both parties to the litigation.

There will therefore be judgment in favour of plaintiff for \$250, together with the costs of the action.

HODGINS, MASTER IN ORDINARY.

JUNE 12TH, 1904.

MASTER'S OFFICE.

RE CEMENT STONE AND BUILDING CO.

EGAN'S CASE.

Company—Winding-up—Contributory—Director—Entries in Register—Resolution of Directors—Attempt to Get Rid of Liability.

Upon a reference for the winding up of the company it was sought to make Samuel Egan liable as a contributory in respect of 10 shares of the capital stock of the company.

THE MASTER:—In this case the director-contributory Egan originally signed in April, 1904, for 5 shares in the capital stock of this company. He subsequently applied for 10 additional shares under the following circumstances:

"Q. Did you subscribe the stock list such as you have described for 10 shares more? A. I don't remember it being a list at all that I gave my name for the 10 shares. Q. How did you apply? A. The president wanted, or the manager wanted, my name to assist him in selling stock, and it was in that way I gave him my name. Q. How did you give him your name? A. I just signed my name on a paper, but I don't remember any list at all, the second time that I signed. Q. On a paper for how many shares? A. For 10 shares."

And further on he stated in answer to my questions: "Q. You say you signed your name for 10 shares more? A. The manager wanted my name in order to assist him to sell stock,—it was not for the sale of the shares to me." After some irrelevant answers he was asked again: "Q. I ask you what was the fact. You say you were asked to subscribe for a purpose, was not that what you have stated? A. Well, the manager represented to me that he was wanting my name to assist him in selling stock. Of course I did not talk much more about it until I saw my name in the book for— Q. And while you gave your name you did not intend that that contract should be binding on you? A. No, your honour, I didn't."

The books of this company shew that certain original entries have been scratched out with a pen knife. But in the journal of 1905, exhibit No. 3, on p. 4, a list of the shareholders appears, among which is the following entry: "Mar. 31, Saml. Egan 420—\$1,500." And in the ledger of 1905 (exhibit No. 5), on p. 420, is the following entry: "1905, Mar. 1, J. + \$1,500—the figure 1 in the \$1,500 being crossed out by a pen mark, but the reference is to the journal, p. 4. In the other books the figure before 500 is scratched out with a pen knife.

These entries explain what the original and erased entries stated, namely, that this director-contributory had been entered in the books of this company as a shareholder for 15 shares of the value of \$100 each, in all \$1,500, on which he has paid \$500, leaving \$1,000 still unpaid.

On 11th March, 1905, this director-contributory was elected a director of the company; and he then complained that the entry of \$1,500 was wrong, and finally at a meeting of the board of directors held on 8th June, 1905, the following entry of a resolution is recorded and was passed at his

instigation or request: "Moved that the application for shares of company stock by Mr. S. Egan be not accepted. Seconded Mr. E. Willfong."

This resolution conflicts with the entries in the financial books of the company, which shew that on 1st March, 1905, this director-contributory had been entered by the company as a shareholder for \$1,500. And the question at once arises: Could this company, after enrolling and entering the director-contributory as a shareholder, deny to him, (if the company had been prosperous) his rights as a shareholder in the shares so acknowledged?

The answer will be found in the observations of Sir W. James, L.J., in *Weikersheim's Case*, L. R. 8 Ch. at p. 83, where, after finding that the names of the contributories had been entered in what he called the "second volume of the register of members," he said: "The company after that could not have disputed the right of any person entered therein, on the ground of his not being registered as a member; and I am of opinion that the member could not dispute the fact that he was entered in that book as a member registered, and having the rights and liabilities of a member of the company." See also *Compbell's Case*, L. R. 9 Ch. at p. 15, and as to the power of directors to remit shares, see *London and Provincial Consolidated Coal Co.*, 5 Ch. D. 52.

Then in the statutory summary or return required by R. S. O. 1897 ch. 191, s. 79, to be transmitted to the Provincial Secretary, the name of this contributory appears as a shareholder as follows: "Egan, S., 143 Spadina Ave., Commercial. Amount of stock held, \$1,500. Amount unpaid and still due thereon, \$1,000." This summary is an official public document in the custody of the Provincial Secretary, and a certified copy is receivable as evidence under R. S. O. 1897 ch. 73.

Prior to the meeting of 8th June, 1905, at which the resolution above cited was passed, the following letter dated 6th June, 1905, and signed by the assistant secretary-treasurer, was stated to have been received by this director-contributory: "Samuel Egan, Esq., Spadina Avenue, Toronto. Dear Sir,—We are in receipt of your application for 100 shares of common stock of the Cement Stone and Building Company, Limited, Toronto, Ontario. We regret that we are unable to allot you this stock, as we have closed our

stock book for the present year. We trust, however, that if at some future time you are still desirous of investing in our company, we shall be able to accommodate you in the matter of allotting you the stock as requested."

When examined by me respecting these proceedings, the contributory stated: "Q. You complained to the board that you ought not to have been made liable for this stock? A. Yes, your honour, I did. Q. Is that the reason that induced the board to carry the motion that has been recorded? A. I would naturally think it was. Q. Then the statement in this letter is the statement of another reason; and which would you say now was the true reason; that which you made before the board, or this which is in the letter? A. That which I made before the board. And that this is untrue? A. O, yes, I would think so. Q. And the rest of the letter I suppose may be answered in the same way: 'We trust, however, that if at some future time you are still desirous of investing in our company, we shall be able to accommodate you in the matter of allotting you the stock as requested.' The expression read in the letter that you were anxious to get the stock and they were refusing it, was also untrue? A. Yes."

The irregular proceedings in thus, by an untrue resolution, seeking to relieve this director-contributory of his liability in respect of the 10 shares entered in his name in the books and in the official summary to the Government, bring this case within the observations of Lord Romilly, M.R., in *Ex p. Munster*, 14 L. T. N. S. 723, where he said: "Where a person who is himself a director of a company seeks to get rid—I don't say, of course, improperly—of his liabilities to the concern of which he is a director, this Court will naturally watch his conduct in the matter, and will hold him strictly to his engagements." See, further, *Brown's Case*, 19 Beav. 97; *Henderson's Case*, 19 Beav. 107; *Straffon's Executors' Case*, 1 DeG. M. & G. 576; and *Bridger's Case*, L. R. 5 Ch. 305.

I must, therefore, hold this director-contributory liable in respect of the 10 shares in question. Costs to follow the event.

HODGINS, MASTER IN ORDINARY.

JUNE 20TH, 1906

MASTER'S OFFICE.

RE CEMENT STONE AND BUILDING CO.

McBEAN'S CASE.

Company—Winding-up—Contributory—Petitioner for Incorporation—Subscription for Shares—Memorandum of Association—Director and President of Company.

Upon a reference for the winding-up of the company, it was sought to place William McBean's name on the list of contributories.

THE MASTER:—In this case McBean was one of the petitioners for the charter of incorporation, in which it was alleged "that by subscribing therefor in a memorandum of agreement and stock book duly executed in duplicate, with a view to the incorporation of the company, your petitioners have taken the following amounts of stock set opposite their names." And under this, among the names, appears the following:

"Petitioners:	"Amount of Stock Subscribed for
"William McBean.	"\$2,200."

Section 10, sub-sec. (4), of the Ontario Companies Act R. S. O. 1897 ch. 191, enacts that "each petitioner shall be the bona fide holder in his own right of the share or shares for which he has subscribed in the memorandum of agreement." The 23rd section of the Imperial Companies Act 1862, though not worded according to the same form, has been interpreted as having much the same effect.

The charter of the company was issued on the 8th February, 1904, and on the 10th February the first meeting of the provisional directors was held, at which McBean was appointed chairman, and certain by-laws and resolutions were carried. A subsequent meeting of the shareholders for organization was held on the same day, at which McBean was appointed chairman, and, after the by-laws and resolutions of the provisional directors had been adopted, McBean was elected one of the directors, and at a subsequent meeting of the directors was elected president of the company.

The minutes of all these meetings have been put in, and the two first are signed by McBean as "chairman;" the latter is signed by him as "president."

The facts in this case appear to be similar to those in Evans's Case, L. R. 2 Ch. 427, the head-note of which states: "E. signed a memorandum of association of a company as the holder of 10 shares, and acted for a short time as a director of the company. Other directors were then appointed, and E. never afterwards had anything to do with the company. No shares were ever allotted to him, and his name was never on the register. All the shares in the company were allotted to other persons, but the allotment was not final [not having been regularly confirmed by the directors], and they were not taken up:—Held, that E.'s name ought to have been on the register, and that he was a contributory in respect of the shares."

This case has been followed in Migotti's Case, L. R. 4 Eq. 236; Sidney's Case, L. R. 13 Eq. 228; Levick's Case, 23 L. T. N. S. 838; and other cases.

I must, therefore, hold that McBean is a contributory in respect of his subscription for \$2,200 worth of shares in this company. Costs will be added.

HODGINS, MASTER IN ORDINARY.

JULY 9TH, 1906.

MASTER'S OFFICE.

JORDAN v. FROGLEY.

Husband and Wife—Marriage before 1859—Right of Wife to Dispose by Will of Property Acquired after Marriage.

A question of title arising upon a reference.

THE MASTER:—Since the judgment in this case reported in 5 O. W. R. 704, one of the defendants, William Jordan, has died; and the question is raised that, as he and Sarah Sharp, daughter of the testator, were married in 1854, and therefore before the Act 22 Vict. ch. 34 (C. S. U. C. ch. 73), that statute did not protect the title which she acquired under her father's will made in 1882, but that it vested in her husband; and the case of Reid v. Reid, 31 Ch. D. 402. is cited

in support of such contention, being a decision under the English Married Woman's Property Act, 1882.

There is, I think, a clear distinction in the wording of the respective Acts, which indicates that decisions under the English Act are not applicable to cases under the Canadian Act.

Section 2 of C. S. U. C. ch. 73, provides that every married woman who, on or before 4th May, 1859, married without a marriage contract or settlement, shall and may after that date have, hold, and enjoy all her real estate and personal property not then reduced into the possession of her husband, "whether belonging to her before marriage, or in any way acquired by her after marriage, free from his debts and obligations contracted after the said 4th May, 1859, and from his control and disposition without her consent, in as full and ample a manner as if she were sole and unmarried."

The English Act, sec. 5, provides that "every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid, as her separate property, all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act."

There is, therefore, a clear distinction in the Acts respecting the acquisition of the right of married women to deal with their property. The right depends upon the time when the "title" to the property vested in the married woman. Our Act operates on prior and future acquired property by virtue of the words "belonging to her before marriage or in any way acquired by her after marriage." The English Act operates on future acquired property, by virtue of the words "her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act."

But sec. 16 of the Act placed a restriction on the previous grant of "full and ample" power to a married woman to have, hold, and enjoy all her real estate not reduced into the possession of her husband, by limiting her power to devise or bequeath the same to any person other than "her child or children issue of any marriage, and failing there being any issue then to her husband." And in *Mitchell v. Weir*, 19 Gr. 568, Strong, V.-C., held that under this section a bequest by

a married woman in favour of her husband was void, and that as to such bequest there was an intestacy.

This section was repealed in 1873 by sec. 46 of the Wills Act, 36 Vict. ch. 20; but such repeal was not to "prevent the application of any . . . provision of laws formerly in force to any transaction, matter, or thing anterior to the said repeal to which they would otherwise apply." The original section with the restriction on a married woman's power to devise or bequeath her property, which existed between 4th May, 1859, and 1st January, 1874, has been consolidated from R. S. O. 1877 ch. 106, sec. 6, down to R. S. O. 1897 ch. 128, sec. 6.

These statutes were considered by the Court of Appeal in *Lawson v. Laidlaw*, 3 A. R. 77, where it was held that the real or personal property enjoyed by a married woman under the statutes of 1859 and 1872 is her separate property at law to the same extent, and with the same incidents, as property settled to her separate use was and is in equity.

Sarah Jordan, one of the daughters of the testator William Sharp, died on 7th June, 1884, having previously made her will dated 21st April, 1884, in which she bequeathed to certain of her children her interest in the estate of her late father.

Under the authority cited I must hold that Mrs. Jordan, notwithstanding her marriage before the Act of 1859, acquired the interest in her father's estate referred to in my former judgment in this case, 5 O. W. R. 704, and had power to dispose of it by the will produced in these proceedings.

MABEE, J.

JULY 13TH, 1906.

WEEKLY COURT.

NORTHERN CONSTRUCTION CO. v. SWANSON.

Interim Injunction—Breach of Contract—Ability of Defendant to Respond in Damages—Affidavit Sworn before Issue of Writ of Summons—Dissolution of Injunction.

Motion by plaintiffs to continue injunction granted by a local Judge restraining defendant from taking or removing

from plaintiffs' right of way any part of the plant, materials, equipment, horses, etc., used in and upon plaintiffs' works, in alleged breach of a contract between plaintiffs and defendant.

W. N. Ferguson, for plaintiffs.

W. E. Middleton, for defendant.

MABEE, J.:—The interim injunction was granted upon the affidavit of plaintiffs' assistant secretary shewing . . . facts that were probably sufficient to satisfy the Court that plaintiffs would, or might, suffer damages, if defendant were permitted to continue the breaches of his contract, which defendant would not be able to pay. The affidavit of defendant shews that he has ample means at his command to satisfy any loss plaintiffs may sustain from any breach of the contract in question, and at the same time defendant's counsel urges that no breach has been committed.

I should refrain so far as possible upon this motion from dealing with questions affecting the ultimate rights of the parties. The construction of the contract is one of such questions, and as to the rights of the parties under its wide provisions I say nothing, except that to my mind it is not at all clear that defendant has made any breach. But, treating the motion as if defendant had no right to take his horses off the work, the case remains as one of simple breach of contract, plaintiffs having as yet sustained no damage, and defendant being able to compensate plaintiffs if they do sustain such damage. Under these circumstances plaintiffs are not entitled to an injunction.

I am not at all impressed with the case advanced by the affidavit of plaintiffs' assistant secretary. The facts are not given with sufficient detail to enable the Court to judge if reasonable grounds exist for his fear of loss arising to plaintiffs. These facts are more within the knowledge of the engineer named in the contract, but no affidavit is made by him. The affidavit in reply does not advance matters. The affidavit upon which the interim injunction was obtained was sworn at Sudbury on 29th June, and the writ of summons was issued at North Bay on 30th June. So in fact there never was any affidavit upon which plaintiffs had any right to obtain an interim injunction. I feel compelled to dissolve this injunction with costs to defendant in any event. Plaintiffs

may have leave to renew their motion if upon a full development of all the facts they may be advised that they can present a proper case for the interference of the Court.

JULY 24TH, 1906.

DIVISIONAL COURT.

ALLAN v. SAWYER-MASSEY CO.

Master and Servant — Injury to Servant — Negligence of Master—Dangerous Work—Neglect to Provide Safeguards —Evidence for Jury—Excessive Damages.

Motion by defendants to set aside judgment for plaintiff for \$2,000 damages in an action for the loss of an eye, tried before MABEE, J., and a jury at Hamilton.

Plaintiff was a mechanic in the employment of defendants, and, while engaged at his usual occupation, was hit in the eye by a piece of steel from a cylinder which was being chipped by a fellow-workman, a short distance away, and his left eye permanently destroyed.

G. Lynch-Staunton, K.C., for defendants, contended that there was no evidence of negligence to submit to the jury, and that the trial Judge should have nonsuited plaintiff, and that the damages were excessive.

J. L. Counsell, Hamilton, for plaintiff.

The judgment of the Court (MULOCK, C.J., TEETZEL, J., MAGEE, J.), was delivered by

TEETZEL, J.:— . . . As to the first branch of the motion, I have come to the conclusion that there was sufficient evidence of negligence to warrant the case being submitted to the jury. . . . It was clearly established that the work of chipping the large castings was not only attended with danger to the operator, but to any one in close proximity. The iron chips fly with a good deal of velocity, and, while not likely to do harm to any other part of the body, would, if the eye were hit, probably cause very serious injury. Under the system adopted by defendants the chipping is done in a room 40 x 56 feet, in which some 15 men are employed at that

work, and no provision whatever is made to protect them from the flying chips. According to the usual practice in defendants' shop, one of their workmen was employed in chipping a large cylinder within a few feet to the rear of plaintiff, and in such a manner that the chips would tend to fly towards where plaintiff was working, and so close were they together that should plaintiff have occasion to turn his head to the right, he was in danger of being struck on the eye by one of the flying chips from the cylinder.

Plaintiff alleges that he was injured in this way, and there was evidence from which the jury might so find. There was also evidence that this danger could be removed, or at least greatly reduced, either by a screen or by placing the cylinder on a pivot so that it could be turned and the chips always sent in an opposite direction from where plaintiff was working, or by having the large castings chipped in an open yard at such a distance from other employees as to remove all danger to them.

The jury were not asked specific questions, but the whole case was submitted to them upon a full and fair charge, against which no objection was made, and, while . . . the evidence might have warranted a verdict in defendants' favour, there was evidence upon all the issues sufficient to warrant a finding for plaintiff.

Assuming that the employment was dangerous—and the evidence establishes that it was—then it was clearly the duty of defendants to use all reasonable precautions for the protection of their servants. . . .

[Reference to *Smith v. Baker*, [1891] A. C. at p. 362; *Williams v. Birmingham*, [1899] 2 Q. B. 338.]

In the light of the Judge's charge to the jury, I think the result of their finding is, that, as regards plaintiff, defendants omitted to take reasonable precautions for his protection, and that they did not, therefore, carry on their operations so as not to subject him to unnecessary risk, and were in consequence guilty of negligence which caused plaintiff's injury.

On motion for a new trial on the ground of excessive damages, the rule as laid down in *Praed v. Graham*, 24 Q. B. D. 53, and enlarged in *Johnson v. Great Western R. W. Co.*, [1904] 2 K. B. 250, is, that a new trial will not be granted on the ground of excessive damages, unless, having regard to

all the circumstances of the case, the Court is of opinion that the amount is so large that no 12 men could reasonably have given it, or unless the Court, without imputing perversity to the jury, comes to the conclusion, from the amount of damages and the other circumstances, that the jury must have taken into consideration matters which they ought not to have considered, or applied a wrong measure of damages.

While in this case the amount may be larger than is sometimes awarded for the loss of an eye, I cannot find, either from the amount or from anything else on record in the case, any reason which would, having regard to the rule, justify our interfering with the verdict.

Appeal dismissed with costs.

FALCONBRIDGE, C.J.

JULY 26TH, 1906.

TRIAL.

VAN TUYL v. FAIRBANK.

PAGE.

Contract — Action to Set aside, for Improvidence — Delay in Bringing Action—Interest in Partnership—Inadequacy of Price—Fraud — Bad Debts — Goodwill—Counterclaim—Costs.

Action by the widow of Benjamin Stoddart Van Tuyl, late of the town of Petrolia, hardware merchant, to set aside an agreement entered into between plaintiff and defendant, dated 7th May, 1902; for an accounting of the partnership business of Van Tuyl & Fairbank; for payment to plaintiff of \$1,468.19 paid into Court and any further sum which might be found due to plaintiff for her interest in the partnership business.

A. H. Clarke, K.C., and N. A. Bartlett, Windsor, for plaintiff, contended that the agreement should be set aside; because (1) plaintiff improvidently and without knowledge of the actual facts entered into it; (2) defendant misled plaintiff in his statements to her concerning the business; (3) it was the duty of the defendant, being the surviving partner of the firm of Van Tuyl & Fairbank, to acquaint plaintiff with all the facts in connection with the business, and that he did not do; (4) plaintiff relied upon defendant's statements wholly, as he, being a partner in the business for up-

wards of 30 years, was the only person who knew what the business was worth.

J. H. Rodd, Windsor, and I. Grenizen, Petrolia, for defendant.

FALCONBRIDGE, C.J.:—This action is brought after the lapse of nearly 4 years, and the delay in attacking the settlement is not satisfactorily accounted for.

Very shortly after the execution of the agreement of 7th May, 1902, the two sons of the deceased threatened proceedings against defendant, and eventually a settlement with them was made upon the basis of \$90,000 as the value of the business, instead of \$75,000, which was the basis of the agreement between plaintiff and defendant. Defendant submitted to this rather than have the business wound up, a proceeding which would be necessarily disastrous to all parties; but this concession of defendant is not an admission (and I do not find it to be the fact) that the larger sum was the true basis.

There was, therefore, no gross inadequacy in price, and it does not appear to me that the agreement can be set aside on the ground of improvidence. Plaintiff employed a manager of a financial institution to go over the statements and the books, etc., for the purpose of ascertaining whether or not the offer made by defendant was a fair one, and she also consulted a solicitor before she came to a conclusion as to the settlement.

Plaintiff has also failed to prove that any fraud was practised upon her. The deduction of 20 per cent. from the invoice price of the goods cannot be said to be unreasonable. On this basis of percentage plaintiff's husband was originally taken into the business, and about 1899, when Van Tuyl was seeking to purchase it from defendant, he put the stock at 80 per cent. in the offer which he made.

Nor does it appear that the allowance for bad debts was excessive, as the result has shewn. Whatever may be its supposed value in England, I regard goodwill as being in 99 cases out of 100 in this province a negligible quantity.

On the whole, I cannot find any legal or moral ground for a judgment in plaintiff's favour, and I dismiss the action with costs and declare defendant entitled to the money in Court.

Nothing was said in the written agreement about the counterclaim, which was probably put forward as a shield and not as a weapon, and, defendant having succeeded on the main issue, the counterclaim may be dismissed without costs.

FALCONBRIDGE, C.J.

AUGUST 1ST, 1906.

TRIAL.

LONDON AND WESTERN TRUSTS CO v. CANADIAN
FIRE INS. CO.

Fire Insurance—Subletting of Premises—Change in Nature of Risk—Notice to or Knowledge of Assured—Notice to Insurance Company—Knowledge of Agent—Absence of Notice in Writing—Statutory Conditions.

Action by the liquidators of an insolvent company which owned certain buildings in the town of Sudbury insured by defendants for 3 years from 4th October, 1904, and destroyed by fire on 30th November, 1905, to recover the amount of the insurance.

The substantial defence was that the insolvent company leased to one Ferres, a Syrian merchant, a portion of the insured buildings, and that Ferres took possession thereof and put and kept therein for sale a stock of merchandise to the value of some thousands of dollars, and therein and thereon carried on the business of a merchant, which change of occupation was material to the risk, which thereby became a mercantile one, and more hazardous than that described in the application for insurance.

G. C. Gibbons, K.C., and G. Gibbons, London, for plaintiffs.

N. W. Rowell, K.C., for defendants.

FALCONBRIDGE, C.J.:—It was admitted that the change of occupation was material to the risk, and it was proved that defendants could not or would not make a contract for insurance on mercantile risks for a term exceeding one year.

There was no proof of actual notice to the insolvent company of the change of occupation, although it would not be very difficult to come to the conclusion that the agent of the insolvent company who signed the application for the insurance had knowledge of it. But I think that the question of notice or knowledge is not material. . . .

[Reference to Bunyon's Law of Fire Insurance, 5th ed., p. 166; Kuntz v. Niagara District Fire Ins. Co., 16 C. P. 578.]

One Fournier, an insurance agent residing in Salisbury, who writes risks for about 16 companies, and who is named on the back of the present policy as the agent of defendants, undoubtedly had notice and knowledge of the condition of affairs. On 8th April, 1905, he took the application for insurance on the stock for a 'Montreal company, and he knew all about Ferres keeping goods there. But I am of opinion that Fournier's knowledge does not affect defendants, as there was no notice in writing to the company or their local agent under statutory conditions No. 3 and No. 20: *Morrow v. Lancashire Ins. Co.*, 29 O. R. 377, 26 A. R. 173; *Guerin v. Manchester Assce. Co.*, 29 S. C. R. 139. . . .

Action dismissed with costs.

MACMAHON, J.

AUGUST 8th, 1906.

WEEKLY COURT.

RE TALBOT AND CITY OF PETERBOROUGH.

Municipal Corporations—By-law Regulating Sale of Cigarettes—Excessive License Fee—Prohibitive By-law—Quashing.

Motion by William Ernest Talbot and Thomas William McDonough for an order that by-law No. 1218 passed by the municipal council of the city of Peterborough on 8th May, 1906, intituled "A by-law to license and regulate the sale of cigarettes," be quashed, on the ground (among many others) that the fee of \$200 for a license, without the payment of which no owner or keeper of a store or shop (other than

taverns and shops holding licenses under the Liquor License Act) could sell cigarettes, was an excessive fee and was in effect prohibitive.

D. O'Connell, Peterborough, for the applicants.

E. H. D. Hall, Peterborough, for the city corporation.

MACMAHON, J.:—The by-law came into force on 1st July last.

The applicant Thomas William McDonough in his affidavit states that he is a ratepayer of the city of Peterborough, where he has carried on business as a tobacconist for some years; that the average profit per box of 10 cigarettes is 1½ cents, and he sells on an average of between 30 and 40 packages per day, and the average profit per day would not be higher than 60 cents, and the profit on such sales for a year would not exceed \$183, and that the license fee of \$200 would be more than the profits from the annual sales; that the number of shops in Peterborough where cigarettes are sold, other than grocery stores and hotels, is 8; that he considers the license fee as practically prohibitory, as no dealer in cigarettes could derive a profit from their sale, and in consequence thereof he did not obtain a license. That at a meeting of the municipal council held on 18th July, at which a petition signed by the tobacconists of the city was presented, asking for a repeal of the by-law, and during the discussion of the petition, McDonough says he heard Alderman Elliott state, "that the idea of the whole council was that the by-law should be prohibitive," and that Alderman Mason said he advocated the by-law because he thought it would be prohibitive.

The affidavit of the other applicant, William Ernest Talbot, is to the like effect.

William George Rundle, a tobacconist, who has been in business in Peterborough for some years, says that since the coming into effect of the by-law he has not sold cigarettes to any purchaser, as he had not obtained a license because the fee for a license he considered prohibitive, as the profits from the sale of cigarettes for a year would not equal the amount of the license fee.

To the like effect are the several affidavits of William John O'Brien, William John Morgan, Arthur Mitchell, tobaccon-

ists, and of Arthur Ray, a clerk in the tobacco store of Daniel Ray, all of whom carry on business in Peterborough.

There are 8 tobacconists in Peterborough; the only one who procured a license is 'Mehail Poppakeriazes, who states in an affidavit filed that his only reason for obtaining a license was that he is the owner of a tobacco shop and pool room, and unless the patrons of the pool room could obtain cigarettes at his tobacco shop adjacent to the pool room, they would not patronize his pool room, and he would lose the revenue from that source, and to retain that revenue he procured the license, although the profits from the sale of cigarettes in his store did not at any time amount to \$200.

Under sec. 583, sub-sec. 28, of the Consolidated Municipal Act, 3 Edw. VII. ch. 19, the councils of cities having less than 100,000 inhabitants may pass by-laws for licensing and regulating the owners and keepers of stores and shops (other than taverns and shops holding licenses under the Liquor License Act), where cigars and cigarettes are sold by retail, and for revoking any license so granted, etc. And sub-sec. 29 gives authority to the council to fix the sums to be paid for licenses required under by-laws passed under the preceding sub-sec. 28. . . .

[Reference to *In re Neilly and Town of Owen Sound*, 37 U. C. R. 389.]

Tobacco, it is said, is used by 80 per cent. of the male population over 16 years old. Some smoke it in a pipe, others smoke cigars, while another class of smokers prefer cigarettes. Some use tobacco to stimulate the nerves, while others say they use it because it is soothing to the nerves. It is common knowledge that many people smoke as regularly as they take their meals, so that the use of tobacco in one form or another is a daily, and in many cases an hourly, necessity to a large number of people.

Having regard to the nature of the business and to the necessity of supplying a great number of the male population with cigarettes, and having regard to the fact that the yearly profits derived from their sale is insufficient to pay the license fee, no other conclusion can be reached than that an unreasonable and prohibitive fee was attempted to be exacted; and that, according to the statements of two of the aldermen at the meeting of the council already referred to, it was intended that the by-law should be prohibitive.

Mr. Hall urged that the license fee could not be regarded as prohibitive because one of the tobacconists of Peterborough — Mehail Pappakeriazes — had obtained a license. The latter states in his affidavit that the reason for procuring the license was to prevent the income derived from his billiard room from being diminished. And the result is that having obtained a license he now enjoys a monopoly of the cigarette trade in the city of Peterborough.

As I have reached the conclusion that the by-law is ultra vires, for the reasons above stated, I have not considered it necessary to deal with the other grounds mentioned in the notice of motion.

The order will go quashing the by-law with costs.

MACMAHON, J.

AUGUST 10TH, 1906.

CHAMBERS.

RE WILLIAMS AND GRAND TRUNK R. W. CO.

Railway—Expropriation of Land—Immediate Possession—Necessity for—Station Site—Plans not Prepared.

Motion by the Grand Trunk Railway Company for an order for immediate possession of part of water lot No. 49, according to plan 5a, and land adjoining the same to the north, in the city of Toronto, set out by metes and bounds in the notice of motion.

M. K. Cowan, K.C., for the railway company.

W. E. Middleton, for the A. R. Williams Co.

MACMAHON, J.:—On 23rd February, 1905, in pursuance of an application made by the Grand Trunk Railway Company to the Board of Railway Commissioners, an order was made authorizing the railway company to take for the purposes of a station, etc., the said lands, the property of the A. R. Williams Company.

Arbitrators were, during the month of July last, appointed to decide as to the value or compensation payable to the owners, but as yet no award has been made in the premises.

By sec. 170 of the Railway Act, 3 Edw. VII. ch. 58, where an award has not been made, a warrant for possession shall be granted by a Judge on affidavit to his satisfaction that the immediate possession of the lands is necessary to carry on the railway, with which the company are ready forthwith to proceed.

The affidavits on which the motion was launched were made by Edward Donald of Montreal, barrister, who is the tax and land agent of the Grand Trunk Railway Company, who states that he is familiar with the values of property in the vicinity of the property in question, and he considers the sum of \$112,500 a fair value and a liberal compensation for the right, title, and interest of A. R. Williams in the lands in question.

Another affidavit made by Walter G. Brownlee, a superintendent of the railway, states (paragraph 8) that immediate possession of the said lands by the railway company is necessary in order to enable them to remove the building and prepare the ground for the station, all as set out in the order of the Board of Railway Commissioners, and with which said work the Grand Trunk Railway Company are ready forthwith to proceed.

When cross-examined on his affidavit, Mr. Brownlee said that the plans for the station had not as yet been completed; that the size of the building was not yet known; and that so far as he knew no contracts had been let for the erection of the building; and the only preparations made for the erection of the building were the instructions given to him to clear up the débris remaining on the lands intended for the station since the great fire in 1904.

Mr. Hays, the general manager of the Grand Trunk, made an affidavit after the motion had been set down, and that I allow to be read, in which he says that architects are preparing the plans for the station, and, when the plans have been decided upon, the contract will be let and work commenced on the station during the coming autumn, and will be continuously and vigorously carried on until completed.

The affidavits wholly fail to shew that the company are ready forthwith to proceed with the erection of the station, as the contract, according to the affidavit of Mr. Hays, is not to be let until the coming autumn, and it may be very late in the autumn before it is let.

The motion will be dismissed with costs, but without prejudice to the right of the railway company to renew the motion when the conditions have changed.

MACMAHON, J.

AUGUST 18TH, 1906.

WEEKLY COURT.

SOVEREEN MITT, GLOVE, AND ROBE CO. v.
WHITESIDE.

*Company—Directors—Filling Vacancies in Board—Quorum
—Special Meeting of Shareholders—Injunction.*

The plaintiffs were incorporated under the Ontario Companies Act. After the charter was obtained by-laws were passed, which were sanctioned by the shareholders in January, 1904, clause 11 providing that "the affairs of the company shall be managed by a board of 7 directors," and clause 13 that "4 directors present at any meeting of the directors shall constitute a quorum for the transaction of business." Seven directors were duly elected to the board in accordance with the terms of the by-law.

During May, 1906, 3 of the directors—Jacob Sovereign, E. S. Sovereign, and R. F. Bell—sold their shares to the defendant Wilbur H. Whiteside, and J. H. Cole, another director, sold his shares to the defendant Ezra Crysler.

The transfers of these shares were made to the respective purchasers thereof on or before 13th June, 1906, and the respective transferors of the shares then ceased to be directors of the company.

After the 4 above named ceased to be directors of the company, the remaining three directors — R. Dalton, D. Dalton, and J. B. Moore—assuming to be a quorum for that purpose, elected Ezra Crysler, James A. Lawson, R. A. Dalton, and George Lawson directors to fill the vacancies that had been created in the board.

The above named defendants then obtained from the local Judge at Hamilton an order, dated 3rd July, restraining R. A. Dalton and George Lawson, two of the plaintiffs, from acting as directors of the plaintiff company, unless duly elected at a

properly called meeting of the shareholders of the company, and Dent Dalton, J. B. Moore, and Rufus Dalton were also thereby restrained from appointing any person or persons on the board of directors of the company and from issuing any of the unissued shares of stock of the company, or from selling, issuing, or dealing with the same.

This injunction was on 12th July continued until the trial.

The defendants W. H. Whiteside, James A. Lawson, and Ezra Crysler (representing not less than one-tenth of the subscribed capital of the company) had on 15th June served a requisition on the company requiring that a special general meeting of the stockholders be called within 21 days for the purpose of electing 4 directors to fill the vacancies in the board of directors, and also for considering, and, if thought fit, passing the following resolution, "That the shares of the company, other than those already issued and allotted to subscribers therefor, shall be issued only when and as directed by a majority of the shareholders at a meeting called for that purpose, or at an annual meeting of the shareholders of the company."

As no action was taken on this requisition, the same defendants, Whiteside, Lawson, and Crysler, who are the holders of more than one-fourth part in value of the subscribed stock of the company, sent to each of the stockholders a notice calling a special general meeting of the stockholders to be held at Delhi on 4th August, 1906; the purpose of the meeting being as stated in the requisition above referred to.

After the service of this notice, and on 3rd September, the plaintiffs obtained from the local Judge at Woodstock an injunction restraining the defendants from electing, at the meeting of the shareholders, called for 4th August, directors of the company to fill the alleged vacancies, and from passing at that meeting a resolution limiting the power of the directors to issue and allot stock in the company of the character described in the notice.

Plaintiffs moved to continue this injunction.

W. A. Dowler, K.C., and G. Kappele, for plaintiffs.

G. H. Kilmer and L. F. Stephens, Hamilton, for defendants.

MACMAHON, J.:—What was urged by counsel for plaintiffs was that, as sec. 40 of the Act provides that the affairs of the company shall be managed by a board of not less than 3 directors, and as that number of qualified directors remained, they were competent and had authority to fill the four vacancies existing in the board after the 4 who sold their stock ceased to be directors.

What is meant by sec. 40 is, that there is the minimum number of directors who can, by a charter granted under the Act, administer the affairs of a company. It in no way limits the right of the company under sec. 45 to pass by-laws to increase the number of directors; and under sec. 47 to provide what number of directors shall form a quorum. And without the quorum being present provided by the by-law, the board is incompetent to transact the business of the company.

In *New Haven Local Board v. New Haven School Board*, 30 Ch. D. 350, the Court of Appeal held that the filling up of vacancies in the local board was business within the meaning of 38 & 39 Vict. ch. 55, sec. 155, and where the board of directors had been reduced by resignations from 9 to 2, the filling by the latter of vacancies was invalid; and in *Re Cambria Peat Co.*, 31 L. T. N. S. 773, it was held that when the quorum specified by the statute, charter, or by-laws is not present, transactions or resolutions of any kind are entirely invalid. So it was held in *Toronto Brewing and Malting Co. v. Blake*, 2 O. R. 175, that where one of 3 directors disposed of his stock he thereupon ceased to be a director, and the directorate then became incompetent to manage the affairs of the company. See also *Bottomley's case*, 16 Ch. D. 681; *Buckley's Companies Acts*, 7th ed., p. 542.

As the 3 remaining directors could not legally fill the vacancies in the board, the only manner in which the 4 directors could be elected for that purpose, was by calling a special general meeting of the stockholders as provided by sec. 52 of the Act.

This was the course sought to be adopted by the defendants *W. H. Whiteside*, *James Lawson*, and *Ezra Cryslar*, when they made the requisition which was served on 15th June.

I take it that was the view entertained by Mr. Justice Mabee as to the manner in which the stockholders should

proceed to fill the vacancies, for the injunction which he continued to the trial enjoined two of the defendants, R. A. Dalton and George Lawson, from acting as directors, "unless duly elected at a properly called meeting of the shareholders of the said company."

The notice given by the defendants W. T. Whiteside, James A. Lawson, and Ezra Crysler, calling a meeting of the shareholders to elect 4 directors to fill the vacancies on the board, was properly given.

The other subject mentioned in the notice as to the unissued stock of the company, even if a resolution were passed, could only be regarded as a recommendation to the directors, and therefore innocuous.

The injunction will be dissolved; costs in the cause to defendants.

FALCONBRIDGE, C.J.

AUGUST 23RD, 1906.

TRIAL.

PHILLIPS v. PARRY SOUND LUMBER CO.

Trespass to Land—Cutting Timber—Joint Tort-feasors—Independent Contractor—Damages—Gross Negligence.

Action for trespass to land.

W. L. Haight, Parry Sound, for plaintiff.

Wallace Nesbitt, K.C., and F. R. Powell, for defendants the Parry Sound Lumber Company.

F. E. Hodgins, K.C., and H. E. Stone, Parry Sound, for defendant Hailstone.

FALCONBRIDGE, C.J.:— . . . It was admitted by the defendants that there had been a trespass upon the lands of the plaintiff, and that trees belonging to him had been cut and carried away, but it was contended that the trespass was an innocent one, and the two defendants sought each to cast the responsibility and the burden of the same upon the shoulders of the other.

I do not find that the defendant company succeeded in proving that Hailstone was an independent contractor and not a servant. The alleged contract (exhibit 9), bearing date 30th September, 1903, was never signed by the parties, and is only faintly and vaguely identified by Hailstone. The only

reference to tamarac poles in it is in a postscript or memorandum in the writing of an officer of the company, and it has relation only to the price to be paid for the same. I do not find that the company and Hailstone were working strictly in accordance with this memorandum. The company kept such control of the work and of the mode of carrying it on, that I find Hailstone not to be a contractor, but servant. There is also some evidence of ratification on the part of officers of the company after it was discovered that a trespass had been committed. I do not find that the position of trees cut on the Killbear block differs from that of those on lot 61. The company were responsible for what their co-defendant did and for what was done by people intrusted with the execution of the work by him. These defendants being then co-trespassers and tort-feasors, have not, in my opinion, succeeded in their internecine struggle to cast the burden the one upon the other, and they are both severally liable to the plaintiff.

I come now to consider the question of damages. I refuse utterly to treat this trespass as so innocent a one as to entitle the defendants to say that they are to pay simply the board measure value of the wood which they have undertaken to cut and haul off the plaintiff's property. I find that there was gross negligence on the part of the defendants in not ascertaining and keeping within the true boundaries of the lots over which they had the right to cut. The key-note of the situation is, no doubt, to be found in the expression repeated over and over in the evidence, that private owners or locatees or grantees were to protect their own lots. For example, see p. 168 of the evidence of defendant Hailstone, line 5: "Q. So that your instructions from the company were to cut everything you dare and let the other people protect their own lots? A. I was to use judgment and care and caution, I admit that, in cutting up to the line, but if there was any doubt I was to let them protect their own lots,"—phrase pregnant with sinister meaning!

There is very little question about the number of the pieces. I exclude the road allowances, as the defendants apparently had the right to cut there. I find there were 180 tamarac trees removed from lot 61, from which I deduct 83 as cut by the plaintiff himself, leaving 97. I find there were 91 cut on Killbear; total 188. I deduct 54 cut on defendant company's lot by leave of Carson, leaving 134 to be

accounted for. If the jury had been retained, there would have been evidence to go to them on which they could have found for the full value named by plaintiff. The circumstances were very exceptional. Pieces of tamarac of unusual length were required for the particular purposes of the contract then in hand. There is no room for the application of the rule in *Hadley v. Baxendale*. A man is not bound to put up a signboard warning trespassers that the timber which they may unlawfully carry off has a special value to the owner. I prefer the measurements of plaintiff's witnesses and their estimate of the size of the timber and the lengths to which it could have been cut. This case was not withdrawn from the jury by any act of mine. It was an assessment of damages which was peculiarly for a jury, and it was at the instance of the parties themselves that I consented to try the case without a jury. I therefore, acting as a jury, proceed to give what I consider a fair, though perhaps by no means an adequate, estimate of the loss. I shall allow the plaintiff the sum of \$5 each for the 134 trees, \$670. I am including in this finding the allowance which would have to be made for the 25 per cent. of the logs which admittedly would not reach the standard required for the long spiles. I also allow for the culls in the woods (which culls the plaintiff did not wish cut at the present time), and for general damage to the lots the additional sum of \$50. I therefore direct judgment to be entered for the plaintiff for \$720 against both defendants with full costs, including costs of examinations for discovery. I make no order as between the two defendants as to costs or otherwise. Thirty days' stay.

MACMAHON, J.

AUGUST 24TH, 1906.

WEEKLY COURT.

RE TOWN OF BERLIN AND BERLIN AND WATERLOO
STREET R. W. CO.

*Statutes—Construction—Repeal of Statute—Exception as to
Action or Proceeding Pending—Municipal Corporation—
Notice of Intention to Take over Street Railway.*

The following case was stated for the opinion of the Court in respect of a certain notice dated 12th January, 1906, given by the town corporation to the railway company:—

The undersigned appointed by the municipal council and the company as hereinafter set forth, hereby submit to this Court a stated case for the opinion of the Court, the questions of law hereinafter referred to arising out of the said notice and proceedings subsequent thereto.

1. The notice marked exhibit A was served upon the president and general manager of the said company on behalf of the said municipal corporation on 18th January, 1906.

2. On 14th May, 1906, the Lieutenant-Governor gave the royal assent to two certain Acts enacted by the Legislative Assembly of the province of Ontario, known respectively as chs. 30 and 31 of 6 Edw. VII. (O.), and which are cited as "The Ontario Railway Act, 1906," and "The Ontario Railway and Municipal Board Act, 1906," respectively.

3. By sec. 259 of ch. 30 of 6 Edw. VII., ch. 208 of R. S. O. 1897, referred to in the notice, was repealed.

4. On 21st June, 1906, an agreement now produced and marked exhibit B was executed by the mayor and clerk of the municipal corporation, and by the president and secretary of the railway company, without either party being aware that ch. 208 of R. S. O. 1897 had been repealed.

5. Three meetings of the undersigned have been held at the town of Berlin on the following dates, viz., 7th July, 8th August, and 16th August, 1906.

6. It was not drawn to the attention of the undersigned till the meeting held on 16th August that R. S. O. 1897 ch. 208 had been repealed as aforesaid, and the undersigned at the meeting of 7th July, directed that a statement of the claims in respect of which the railway company seek compensation be delivered to the solicitors for the municipal corporation on or before 20th July, and also that the municipal corporation should be entitled to enter upon the real property of the railway company and to inspect the same, and to make a survey of the undertaking of the railway company, and at the meeting of the undersigned on 8th August certain discussions took place and certain directions were given by the undersigned as particularly set forth in the stenographer's notes taken at that meeting, now produced and marked exhibit C hereto.

7. At the meeting of the undersigned held on 16th August it was brought to our attention by counsel for the railway company that ch. 208 of R. S. O. 1897 had been repealed by the statute 6 Edw. VII. ch. 30, and the question

of the effect of the repeal was raised upon the proceedings hereinbefore referred to, and as a consequence this case was stated for the opinion of the Court.

8. The undersigned respectfully request the opinion of this Court upon the questions of law as follows:—

(1) Has sec. 65 of 6 Edw. VII. ch. 31 the effect in law of preventing the repeal of R. S. O. 1897 ch. 208 as to said reference, under the circumstances above detailed, and is the said R. S. O. ch. 208 thereby continued in force and effect for the purpose of said reference and notice (exhibit A) hereinbefore referred to.

(2) Is the reference above referred to “an action or other proceeding” within the meaning of sec. 65 of 6 Edw. VII. ch. 31?

(3) If so, was the said reference pending within the meaning of the phrase “any action, or other proceeding ‘pending’ at the time of coming into force of this Act”?

(4) If 6 Edw. VII. ch. 31, sec. 65, has not the effect in law of continuing R. S. O. 1897 ch. 208 in force and effect as above stated, then were the said municipal corporation and the said railway company entitled to enter into, and are they bound by the terms of, the said agreement of 21st June, 1906, such agreement having been acted upon by the proceedings taken on 7th July and 8th August, above referred to, by the undersigned, without objection on the part of the parties to said agreement or either of them.

(5) If R. S. O. 1897 ch. 208 is repealed by 6 Edw. VII. ch. 30, then, in the absence of any forum expressly created by the last named statute to fix compensation in reference to their existing franchises, does not the fact that the notice of taking over was given in pursuance of the last named statutes (sic) before being repealed, leave the parties at large to continue their proceedings under the old Act or create their own forum.

Dated at Berlin, August 16th, 1906.

(sgd.) Joseph Jamieson,

“ E. Morgan,

“ J. M. Scully,

Arbitrators.

Exhibit A referred to in the stated case was as follows:

“To the Berlin and Waterloo Street Railway Company. You are hereby notified, pursuant to sec. 41 of the Street Railway Act, being ch. 208 of the Revised Statutes of Ontario, 1897, that at the expiration of twenty years from the

time of passing by-law No. 355 of the corporation of the town of Berlin, that is to say, to wit, the 6th day of September, 1906, the said corporation of the town of Berlin intend to assume the ownership of your railway, and all real and personal property in connection with the working thereof, on payment of the value thereof to be determined by arbitration, and generally to exercise in relation thereto, all the powers conferred upon the said corporation by sec. 41, and any other sections of the said Act which may be applicable.

"That the arbitration may be proceeded with, and the value of the said railway and property determined, as provided by the said section, you are hereby notified to submit to the mayor of the said corporation the name of a person whom you desire to be appointed sole arbitrator to determine such value, in order that the said corporation may consider such nomination, and either accept the same or submit another name or other names.

"Dated this 12th day of January, 1906.

"The Corporation of the Town of Berlin.

"A. Brecker, Mayor.

"A. Alleter, Clerk."

W. B. Raymond and J. A. Scellen, Berlin, for the town corporation.

W. D. McPherson, for the railway company.

M^{AC}MAHON, J.:—On 15th June the municipal corporation notified the railway company that an application would be made to a Judge in Chambers on the 19th for an order appointing an arbitrator or arbitrators to determine the value of all the real and personal property of the railway company pursuant to sec. 41 of the Street Railway Act, R. S. O. 1897 ch. 208, and, in pursuance of the notice served upon the railway company on behalf of the applicants dated 12th January, 1906.

Nothing appears to have been done under the notice, as on 21st June an agreement under seal was entered into between the town of Berlin and the railway company, which recites that the 20 years during which the company was authorized to operate the railway would expire on 6th September, 1906, and that the municipal corporation intended to assume the ownership, etc.; and that the railway company and the corporation had been unable to agree upon a single arbitrator, and had agreed there should be three arbitrators, and that the town had appointed John M. Scully as arbitrator, and

the railway company had appointed Edward Morgan, junior Judge of the County of York, as arbitrator, who, under the authority conferred by the agreement, had appointed Joseph Jamieson of Guelph, County Court Judge, as third arbitrator.

Although ch. 208 of R. S. O. 1897 has been repealed by 6 Edw. VII. 30, it is provided by sec. 65 of 6 Edw. VII. ch. 31, that such repeal "shall not affect any action or other proceeding pending at the time of the coming into force of this Act."

By sec. 41 of R. S. O. 1897 ch. 208, it is provided that "A municipal corporation may, after giving six months' notice prior to the expiration of the period limited, assume the ownership of the railway and all real and personal property in connection with the working thereof on payment of the value thereof to be determined by arbitration."

As the giving of the notice six months prior to the expiration of the period limited for operating the railway is a condition precedent to the right of the municipal corporation to institute arbitration proceedings to determine the value of the undertaking, it follows that the notice itself was "a proceeding pending" in connection with the arbitration at the time of the coming into force of the 6 Edw. VII. ch. 31, on 1st June, 1906.

I therefore in answer to the first question say that sec. 65 of 6 Edw. VII. ch. 31 prevents the repeal of R. S. O. 1897 ch. 208, in so far as the reference in question is concerned.

As to the second question, I answer that the notice was "a proceeding pending" within the meaning of sec. 65 of 6 Edw. VII. ch. 31.

3. The answer to question 3 is included in the above answer to question 2.

4. It follows from the answers to the preceding questions that the municipal corporation and the railway company are bound by the agreement of 21st June, 1906.

5. Having regard to the preceding answers, it becomes unnecessary to answer question 5.

The attention of the legislature should be drawn to sec. 202 of 6 Edw. VII. ch. 30, as it does not appear to me to apply to any railway except those to which municipal corporations have granted privileges since the Act came into force.

The railway company must pay the costs of the town of Berlin.

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ONTARIO WEEKLY REPORTER

(To and including September 8th, 1906).

VOL. VIII. TORONTO, SEPTEMBER 13, 1906. No. 7

CARTWRIGHT, MASTER.

SEPTEMBER 7TH, 1906.

CHAMBERS.

McRAE v. BALLANTYNE.

Writ of Summons—Service out of Jurisdiction—Motion to Set aside — Grounds—Res Judicata—Premature Action—Discretion—Costs.

Motion by defendants Ballantyne and Lowell & Christmas to set aside an order for service on them out of the jurisdiction of the writ of summons and statement of claim, and to set aside the service effected thereunder.

A. W. Ballantyne, for applicants.

Grayson Smith, for plaintiff.

THE MASTER:—This action is a result of that of Gillard v. McKinnon, the facts of which are to be found in 6 O. W. R. 365. It was tried at the Stratford Spring Assizes, before Britton, J., and a jury, and resulted in a verdict and judgment for plaintiff.

This is now in appeal before a Divisional Court. On 6th June the action of McRae v. Ballantyne was commenced, the plaintiffs herein being all those who were defendants in Gillard v. McKinnon, except Duncan J. McKinnon, who is a defendant in this second action.

It is brought against Ballantyne, Lowell & Christmas, and Duncan J. McKinnon, to recover damages for alleged deceit and fraud on their part whereby the plaintiffs were induced to make the note sued on in Gillard v. McKinnon.

The usual order was made for service out of the jurisdiction on Ballantyne and Lowell & Christmas.

These two defendants moved to set aside that order and service thereunder.

The two grounds relied on in support of the motion were: (1) that the matter was *res judicata*, having been determined in the action brought by Gillard; (2) that in any event this action was premature until the final disposition of that action.

As to the first ground, it was answered that the parties in the two actions are not the same, and that the issues are altogether different.

This, I think is correct. It may be that Gillard would be entitled to recover as being an innocent holder for value, and yet that the plaintiffs might succeed in their action against Ballantyne et al. for inducing them to make it.

In any case the defence of *res judicata* will be open to defendants, and cannot be disposed of on the present motion. It is really equivalent to a demurrer to the statement of claim, and must be disposed of in Court: see *Knapp v. Carley*, 7 O. L. R. 409, 3 O. W. R. 187.

As to the second ground, it seemed to me at first to be entitled to considerable weight. It is plain that, if the plaintiffs in this action are successful, the measure of damages will depend largely on the final determination of the Gillard action. Still it does not seem right to delay them on this ground. This point can safely be left to be dealt with by the Court hereafter. *Prima facie* the plaintiffs have a cause of action, as the allegations in the statement of claim must be assumed to be true at present and for the purpose of this motion. It should therefore be dismissed, and the defendants should forthwith deliver their statements of defence.

The costs of this motion may be in the cause, as it might be thought it was a case for invoking the "discretion in the Court as to allowing service" spoken of in *Baxter v. Faulkner*, 6 O. W. R. 198.

ANGLIN J.

SEPTEMBER 7TH, 1906.

WEEKLY COURT

LONDON AND CANADIAN LOAN AND AGENCY CO.
v. NATIONAL CLUB.

Injunction—Interference with Ancient Lights—Interim Injunction—Erection of Building—Speedy Trial.

Motion by the plaintiffs to continue an injunction restraining the defendants from erecting a building close to the plaintiffs' building on Bay street, in the city of Toronto, in such a manner as to exclude light.

S. H. Blake, K.C., and B. N. Davis, for the plaintiffs.

A. C. McMaster, for the defendants.

ANGLIN, J.:—It would not perhaps be wholly satisfactory to determine upon the present material whether or not the construction of the defendants' projected building will so interfere with light to which the plaintiffs claim to be entitled, that the occupation of their premises will be thereby rendered "uncomfortable according to the ordinary notions of mankind." As this action must go down for trial in due course, it seems to me undesirable in disposing of the present motion to enunciate any propositions of law which might prove embarrassing at a later stage. I therefore abstain from stating conclusions to which consideration of the authorities cited, with others, has led me.

But a case of intended substantial interference by the defendants with what are admittedly ancient lights of the plaintiffs has been *prima facie* established.

In the case of the western aperture this projected interference amounts to total extinction. It is better in the interest of the defendants, quite as much as in that of the plaintiffs, that the question at issue should be determined before, rather than after, the construction of the defendants' building. There need be no difficulty in having a speedy trial of this action. In the exercise of that discretion which always governs the Court in dealing with interim injunctions, it will, I think, be proper to preserve matters in statu quo until the trial is had. Upon the plaintiffs undertaking to bring this

action to trial on the earliest day possible and giving the usual undertaking as to damages, the injunction will be continued until the trial. The costs of this motion will be in the cause unless the trial Judge should otherwise direct.

FALCONBRIDGE, C.J.

SEPTEMBER 4TH, 1906.

TRIAL.

CAMPBELL v. TOWNSHIPS OF BROOKE AND
METCALFE.

*Highway — Non-repair — Injury to Person — Necessity for
Guard-rail—Liability of Municipal Corporations—Dam-
ages.*

Action for damages for personal injuries sustained by one of the plaintiffs, a married woman, by reason of the non-repair of a highway as alleged, and for expenses incurred by the other plaintiff, her husband, in consequence of the injuries.

G. C. Gibbons, K.C., and J. C. Elliott, Glencoe, for plaintiffs.

T. G. Meredith, K.C., R. V. LeSueur, Sarnia, and H. G. Pope, Strathroy, for defendants.

FALCONBRIDGE, C.J.:—I find the issues as to the condition of the road and the necessity for a guard-rail in favour of plaintiffs.

The principles are laid down in *Walton v. York*, 6 A. R. 181; *Foley v. East Flamborough*, 26 A. R. 51; *Plant v. Normanby*, 10 O. L. R. 16, 6 O. W. R. 31. The subject is discussed and the authorities are collected in Mr. Denton's valuable work on this branch of Municipal Negligence, p. 113 et seq.

And I find that the defects in the highway caused the accident. I prefer the evidence of plaintiffs and Myrtle Leach to that of Archibald Compbell, Christina Leach, and W. H. Leach. Campbell's partizanship was illustrated by his taking the trouble to play the part of eavesdropper at a conversation on the Saturday before the trial between plaintiffs' solicitor and another.

The violent and irreconcilable conflict of medical testimony as to the more serious symptoms of the female plaintiff render the question of damages very difficult to decide.

I award the male plaintiff \$500 (which of course takes into account the expense which he has incurred and will incur in and about his wife's treatment), and to her I give \$1,500.

Judgment accordingly against both townships with costs.

ANGLIN, J.

SEPTEMBER 8TH, 1906.

CHAMBERS.

RE RODNEY CASKET CO.

*Company—Winding-up—Service of Petition on Assignee for
Benefit of Creditors—Resignation of Directors.*

Petition by creditors for an order for the winding-up of the company under the Dominion Act.

G. M. Clark, for the petitioners.

R. C. H. Cassels, for the assignee for the benefit of creditors and for nine creditors.

ANGLIN, J.:—Creditors' petition for a winding-up order. The company have made an assignment for benefit of creditors to one Hugill. Service of the petition has been effected only upon the assignee. Mr. Cassels objects that this is not service upon the company as required by sec. 8 of the Dominion Winding-up Act, and also opposes the application as contrary to the wishes of creditors holding, as he states, three-fourths of the total claims against the company. Mr. Clark supports the service on the assignee, urging that he is an agent of the company within the meaning of Con. Rule 159, which, he contends, applies to proceedings under the Winding-up Act.

In my opinion, service upon the assignee is not service upon the company as required by the statute. Although in the present instance the views of the assignee are said to accord entirely with those of the directors of the company, many cases may arise in which this will not be the position. The company are entitled to notice and to be represented and

heard upon the petition. To hold service on an assignee for the benefit of creditors to be a good service upon the company might in many instances deprive the company of this important right.

It is said that the directors gave the assignee "instructions to act for them and for the company, and to carry on the business of the company," and that they resigned their offices immediately after the execution of the deed of assignment.

The unaccepted resignation of the directors is ineffective to denude them of their character and responsibilities as officers of the company. Their alleged instructions to the assignee fall far short of an authority to him to accept service or to represent the company in winding-up proceedings, which, if successful, will terminate his functions as assignee.

It would, I think, be straining Rule 159 much beyond anything contemplated by its framers, were this assignee to be held an agent, service upon whom would be service upon the company, notwithstanding the fact that the president and directors are admitted to be readily accessible and easily to be served.

Upon this ground I must refuse the petition with costs, which I shall fix at the sum of \$5.

ANGLIN, J.

SEPTEMBER 8TH, 1906.

WEEKLY COURT.

LEES v. TORONTO AND NIAGARA POWER CO.

Railway—Expropriation of Land—Defective Proceedings—Injunction—Special Act—Incorporation of Provisions of General Act Subsequently Passed—Notices of Expropriation—Failure to State Extent of Estate or Interest to be Acquired—Uncertainty—Warrant for Immediate Possession—Proof of Notice under sec. 171 of Railway Act, 1903—Necessity for.

Motion by defendants to dissolve an interim injunction restraining them from entering upon the lands and premises of the plaintiffs.

R. B. Henderson, for defendants.

R. McKay, for plaintiffs.

ANGLIN, J.:—This injunction was originally granted because of defects in expropriation proceedings instituted by defendants. They now allege that by fresh proceedings they have cured these defects, and they claim . . . a warrant for immediate possession under sec. 170 of the Dominion Railway Act of 1903.

When the present motion was launched, it seems clear that the defendants were not in a position to sustain it. They have since filed plans and given the requisite notice by newspaper advertisement, under sec. 152 of the Railway Act, as is shewn by material filed by leave upon the argument.

The Chief Justice of the King's Bench has held in *Davidson v. Toronto and Niagara Power Co.* (17th January, 1906), that the provisions of the Railway Act of 1903 corresponding to the sections of the Railway Act of 1888, which are in the special Act of the defendants (2 Edw. VII. ch. 107 (D.)) must now be deemed to be incorporated in this special Act in lieu of the repealed provisions of the former Railway Act. This decision precludes any consideration of Mr. McKay's able argument in support of his contention that the enumerated sections of the Railway Act of 1888 still apply to the defendants.

But Mr. McKay objects to the new notices of expropriation given by the defendants, on the ground that they do not define the interests in the plaintiffs' lands which the defendants seek to acquire. He also contends that, the notices prescribed by sec. 171 of the Railway Act of 1903 not having been given, defendants are not entitled to a warrant under sec. 170.

While it may be held, in the case of a railway company not enjoying such special powers as are conferred on defendants by sec. 21 of 2 Edw. VII. ch. 107, that under a notice for the expropriation of lands, without definition of the interest to be taken, the owner should understand that the acquisition of the fee simple is intended, it by no means follows that a like notice given by a company having power to acquire "any privilege or easement required by the company for constructing the works authorized by this Act, or any portion thereof, over and along any land, without the necessity of acquiring a title in fee simple thereto," and whose special Act defines the word "land" as including

any such privilege or easement, etc., is open to no other construction.

The notices of expropriation given by defendants do not state whether it is the fee simple of plaintiffs' lands, or merely some easement or privilege over and along them, which they seek to acquire. On the contrary, these notices intimate that the company propose to acquire the lands described in the notices "to the extent required for the corporate purposes of the company." It may well be that these purposes require only the expropriation of the privilege or easement of a right of way for the poles and wires of defendants, and not the acquisition of the title in fee simple.

In my opinion, such notices are too uncertain to serve as the foundation for proceedings instituted to effect forcible deprivation of property.

I do not find either in *Hendrie v. Toronto, Hamilton, and Buffalo R. W. Co.*, 26 O. R. 667, 27 O. R. '6, or in *Maclean v. James Bay R. W. Co.*, decided by Street, J., 20th February, 1905, both cited . . . as authorities for the granting of a warrant under sec. 170 of the Railway Act without proof of notice under sec. 171, anything which would countenance such a course. . . . For my part, I entertain a very strong view that the extraordinary powers conferred by sec. 170 should be exercised only upon proof of strict compliance with the requirements of sec. 171, and that the presence of the parties in Court to answer another motion affords no ground for dispensing with a notice which is made a condition precedent to jurisdiction, and which, quite within their rights, plaintiffs here decline to waive.

Not only because defendants were not in a position to sustain their motion when launched, but also for other reasons indicated, I must decline to dissolve the injunction, and I dismiss defendants' motion with costs to plaintiffs in any event of this action.

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VOL. VIII. TORONTO, SEPTEMBER 20, 1906. NO. 8

FALCONBRIDGE, C.J.

AUGUST 24TH, 1906.

TRIAL.

DAVIDS v. NEWELL.

Easements—Light—Air—Ventilation — Private Way — Prescription—Proof—Injunction—Damages—Costs.

Action for an injunction and damages in respect of trespass to land, etc. ..

T. D. Delamater, K.C., and C. C. Ross, for plaintiffs.

E. E. A. DuVernet and D. C. Ross, for defendants.

FALCONBRIDGE, C.J.:—Plaintiffs have proved their paper title, and it lay upon defendant to shew satisfactorily the enjoyment of the three easements which he claims, for such a length of time as to confer a right.

He failed entirely to prove any agreement or license such as is set up in paragraph 4a of the statement of defence as amended.

R. S. O. 1897 ch. 133, sec. 36, stands in defendant's way, and prevents any claim by him for access and use of light.

But it is improper to couple "light" and "air" together in every case: Gale, 7th ed., p. 572; and he has established his right to maintain his openings for access of air, i.e., ventilation.

As to the right of way claimed over the alleged lane, the burthen rests on defendant to prove his enjoyment for the requisite length of time to have been open, peaceable, and as of right, "nec vi. nec clam, nec precario:" Gale, p. 201. This, I think, he has failed to do in the clear and satisfactory manner which the law requires when it is sought to take any property or any kind of enjoyment thereof from the true owner.

The defence therefore fails except as to the minor and comparatively immaterial point mentioned above. No doubt, if defendant had confined his claim to that one matter, plaintiffs would not have taken the trouble to contest it. Therefore there should be no allowance made therefor in considering the question of costs.

Plaintiffs will have judgment as indicated above, with \$25 damages and an injunction and full costs.

MACLAREN, J.A.

AUGUST 27TH, 1906.

C.A.—CHAMBERS.

RE SINCLAIR AND TOWN OF OWEN SOUND.

*Appeal to Court of Appeal—Leave to Appeal per Saltum—
Order Quashing Municipal By-law—Judicature Act, sec.
76a—Grounds for Granting Leave.*

Motion by the corporation of the town of Owen Sound for leave to appeal per saltum to the Court of Appeal under sec. 76a of the Judicature Act from the order of MABEE, J., ante 239, quashing a local option by-law of that town.

D. C. Ross, for the corporation.

J. Haverson, K.C., for Sinclair.

MACLAREN, J.A.:—An appeal lies to the Supreme Court in such a case from a judgment of this Court under sec. 24 of the Supreme Court Act. Mr. Haverson argues that sec. 76a of the Judicature Act applies only to actions, and not to judgments in proceedings like this, which are not begun by writ. I can see no ground for so restricting the section, which in terms applies to any judgment, order, or decision of a Judge in Court, at the trial or otherwise, from which an appeal lies from this Court to the Supreme Court.

The only question remaining is whether this is a proper case to grant such leave. There are several important debatable questions of law involved, and I am of opinion that this case fairly comes within the principles laid down in *Canada Carriage Co. v. Lea*, 5 O. W. R. 86, and *Playfair v. Turner*, 7 O. W. R. 744. The motion is accordingly granted.

MEREDITH, C.J.

JUNE 22ND, 1906.

CHAMBERS.

RE ELGIE, EDGAR, AND CLEMENS.

Interpleader—Application for Order — Stakeholder — Chattel Mortgage—Surplus in Hands of Mortgagee—Claim under Order for Payment of Part of Surplus — Claim under Purchase from Mortgagor.

Appeal by Elgie & Co., applicants, from order of Master in Chambers, ante 33, dismissing an application for an interpleader order.

F. Arnoldi, K.C., for appellants.

J. A. Scellen, Berlin, for claimant Clemens.

T. E. Godson, Bracebridge, for claimant Edgar.

MEREDITH, C.J., dismissed the appeal with costs to the claimant Clemens and without costs to the claimant Edgar.

MABEE, J.

SEPTEMBER 14TH, 1906.

TRIAL.

CANADIAN PACIFIC R. W. CO. v. GRAND TRUNK
R. W. CO.

Railway—Leasehold Interest in Land—Sub-lease—Covenant—Payment of Rent—Acquisition of Fee—Compensation—Interest—Agreement—Reference—Costs.

Action for rent or in the alternative for compensation in respect of plaintiffs' leasehold interest in certain lands.

E. D. Armour, K.C., and Angus MacMurchy, for plaintiffs.

W. Cassels, K.C., and W. A. H. Kerr, for defendants.

MABEE, J.:—Under the document of 20th January, 1886, plaintiffs had defendants' covenant for the payments of the rent as set forth therein, and defendants are therefore liable for such payments, unless something has taken place to relieve them of that covenant.

It is contended for defendants that they are released from their covenant by reason of the agreement made between them and plaintiffs dated 26th July, 1892, being an arrangement for the construction and maintenance of the Union Station at Toronto, and a surrender executed by the defendants dated 20th July, 1894. The fifth Esplanade agreement, also dated 26th July, 1892, was relied upon for the arguments advanced by defendants' counsel. . . .

The land covered by the sub-lease from plaintiffs to defendants of July, 1886, forms part of the Union Station, and is clearly land which defendants by their agreement with plaintiffs of 26th July, 1892, were bound to acquire for station purposes; the fee was in the city of Toronto; plaintiffs were lessees with renewal rights; and, had defendants at that time taken steps to acquire this land, compensation would have been made to plaintiffs for their rights as such lessees; no steps were taken by defendants to obtain title to the lands in question, and plaintiffs have ever since been paying rent to the city under the lease to them, but defendants have paid no rent under their sub-lease since July, 1894. It may be that the strict right of plaintiffs is to recover upon the basis of defendants' covenant, but I think the more equitable way to dispose of the matter is to treat it as the parties at the time seemed to contemplate, and so far as possible place them in the position they would have been in had the lands been acquired by the defendants pursuant to the terms of the agreement.

I do not think plaintiffs were bound to provide these lands in question for station purposes, nor do I think that anything that has been done by any of the parties has deprived plaintiffs of their right to be compensated for the interest they had in the lands under their lease from the city; and the Statute of Limitations forms no bar. I am unable to say that plaintiffs have estopped themselves from making this claim; the correspondence shews they have been demanding payment of rent as the same fell due; and certain other demands and offers were made by them, which, however, form no part of the case, although appearing in the exhibits, as all immaterial matters were excepted. It does not appear that plaintiffs have been compensated by the city, as counsel for defendants contended, nor do I think that the construction of the York street bridge, and the clauses of the agreement

bearing upon that work, stand in plaintiffs' way. If plaintiffs once had the right to be paid by defendants for their leasehold interest, which I think they had, I am unable to say that anything has taken place to deprive them of such right. It is possible that the position of defendants as against a claim for rent may be stronger, but I am not considering that aspect of the case. The pleadings make a claim, in the alternative, for compensation. It was agreed at the trial that if I came to the conclusion that plaintiffs were entitled to recover upon this alternative claim, the parties would agree upon a referee, as nothing is before me upon which I could fix the amount payable. There will, therefore, be a reference to ascertain the value of the leasehold interest of plaintiffs in the lands in question as of July, 1892. Plaintiffs will be entitled to interest upon that sum, and defendants will be entitled to credit for the rent paid by them to plaintiffs subsequent to that date. Had defendants acquired title to the property, the sum paid would, under the Union Station agreement, have gone to capital account expenditure, and plaintiffs would have been chargeable with one-half the interest thereon, as the agreement provides. The referee will credit defendants with the sum plaintiffs would have been liable to pay to them for such interest, and generally take the account in such manner as will leave the parties in the position they would have occupied had the agreements been carried out at the time and in the manner I think their letter and spirit required. Reimbursement for any rentals paid by plaintiffs to the city is not claimed.

If the parties are unable to agree as to the amount that should be paid to plaintiffs, or as to a referee, I will name one upon the application of either party upon notice to the other. It is of course obvious that the position of both parties, as between themselves and the city, and also as between themselves, in the event of defendants at any time acquiring the fee from the city, or making the latter compensation therefor, is left untouched by anything that may have been disposed of in this action.

Plaintiffs will have costs down to and including the trial, but if a reference is necessary the costs thereof will be reserved as well as further directions.

CARTWRIGHT, MASTER.

SEPTEMBER 17TH, 1906.

CHAMBERS.

WOODRUFF CO. v. COLWELL.

Company—Parties to Action—Authority to Use Name—Solicitor—Meeting of Shareholders.

Action by the company and the Messrs. Woodruff personally to restrain defendant from acting as manager of the company and dealing with its assets, etc.

Defendant moved to strike out the name of the company as plaintiffs and to require the other two plaintiffs to give security for costs.

C. A. Moss, for defendant.

W. N. Ferguson, for plaintiffs.

THE MASTER:—The defendant has filed an affidavit on which he has been cross-examined. He admits that the Messrs. Woodruff and himself are the only directors of the company, and that a majority of the stock is held by them.

He contends, however, that under the provisions of an agreement made in April last the Woodruffs have ceased to have any interest in the company.

This, however, is denied by the other side; and it seems clear that this is a question in dispute between the parties. In these circumstances, I think the motion should be dismissed with costs in the cause.

This seems to be the course indicated as proper in such cases by Jessel, M.R., in *Pender v. Lushington*, 6 Ch. D. 70, 79, 80.

Plaintiffs' solicitors seem to have authority to bring the action, so far as the Woodruffs are concerned, by the telegram sent by them from San Francisco. And by another telegram they have assumed to dismiss the defendant from the office of manager.

No doubt, there will be given all proper directions as to calling a meeting of the company if defendant still disputes the rights of the Woodruffs in the company, if the injunction is granted.

A somewhat similar question came up and was dealt with in *Saskatchewan Land and Homestead Co. v. Leadley*, 2 O. W. R. 944, 1075, 1112; S.C., 3 O. W. R. 133, 191.

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CARTWRIGHT, MASTER.

SEPTEMBER 17TH, 1906.

CHAMBERS.

BLACK v. ELLIS.

*Stay of Proceedings—Motion for—Other Actions Arising out
of Same Contract—Different Causes of Action.*

Motion by defendant Ellis to stay the action until the disposition of other pending actions in which, as it was alleged, the same issue was raised.

W. R. Riddell, K.C., for defendant Ellis.

W. E. Middleton, for plaintiff.

THE MASTER:—The facts as they appear in the report of the case in 7 O. W. R. 490, shew the nature of this action. From defendant's affidavit filed in support of the motion it appears that on 6th August the Consumers Electric Co. commenced an action against the city of Ottawa, which, it is alleged, raises the same point as the present action, and is no doubt in respect of the same agreement. By agreement of the parties it seems that this later action will be set down for trial at Ottawa on the 24th instant. The present action was at issue in June, and has, I think, been already set down and notice of trial given.

It was contended by counsel for plaintiff (1) that there was no power to stay in such a case as the present; and (2) that even if the power existed it should not be exercised here.

As to the first objection it looks as if it was met by the case of *Lee v. Mimico Real Estate Co.*, 15 P. R. 288. But it is not necessary to decide this at present, for on the second

ground I agree with the plaintiff. The actions are so different that they certainly could not be consolidated. Even if this could be done, the conduct of the cause should ordinarily be given to the earlier plaintiff. See *Girvin v. Burke*, 13 P. R. 216.

If both of these cases are set down on the same list, and come on before the same Judge, he will be in a position to deal with them far better than any one else. I think it should be left with him, and that this motion should be dismissed, with costs to plaintiff in the cause.

This will be without prejudice to any application that may be made to the presiding Judge at Ottawa. . . .

It may be safely assumed that all the witnesses in both actions reside at Ottawa, and can be secured at any time.

CARTWRIGHT, MASTER.

SEPTEMBER 17TH, 1906.

CHAMBERS.

GRANT v. McRAE.

*Slander—Pleading—Defence—Striking out—Embarrassment
—Privilege—Mitigation of Damages.*

Motion by plaintiff to strike out paragraphs 3 and 4 of the statement of defence as embarrassing.

Featherston Aylesworth, for plaintiff.

Grayson Smith, for defendant.

THE MASTER:—This is an action in which the plaintiff alleges that the defendant on 3rd January last, and on various other occasions, spoke and published the following words concerning the plaintiff: "Dan Grant burnt the barn for the insurance." The innuendo was that the plaintiff was guilty of the crime of arson.

It is admitted that the barn was insured at the time it was burnt.

The statement of defence was delivered on 4th September instant. The defendant was examined for discovery

on the following day, pursuant to an appointment given on 1st September. The statement of claim was delivered on 19th June.

The plaintiff probably thought he might get down to trial at the Cornwall Assizes commencing on 24th instant. Otherwise it was inconvenient to have examination for discovery before the statement of defence was delivered: see *Barwick v. Radford*, 7 O. W. R. 237.

The statement of defence in the 2nd paragraph denies the allegations contained in the statement of claim, and proceeds as follows:

3. On the evening of the 3rd of January, 1906, a barn belonging, as the defendant believes, to the plaintiff, was totally destroyed by fire, and in this barn was a large quantity of hay belonging to the defendant's father, which was totally destroyed by this fire and was uninsured.

4. The defendant says that if he ever spoke or used any language concerning the plaintiff in reference to the said fire, what he said was nothing more than a mere expression of belief or opinion made honestly and without malice.

The plaintiff moves to strike out paragraphs 3 and 4 as embarrassing.

It is clear from the decision in *Rassam v. Budge*, [1893] 1 Q. B. 571, that the motion must succeed, as it is impossible to say what these paragraphs mean. If the defendant wishes to set up privilege or to plead in mitigation of damages, he must do so plainly. If he denies that he used the words alleged or words substantially the same, he must be content with the 2nd paragraph.

The paragraphs must be struck out, and the defendant, if he desires to do so, must amend within 10 days.

The costs of the motion will be to plaintiff in any event.

SEPTEMBER 17TH, 1906.

DIVISIONAL COURT.

LAKEFIELD PORTLAND CEMENT CO. v. E. A.
BRYAN CO.

*Summary Judgment—Rule 608—Action for Money Demand
—Effect of Delay—Payment into Court.*

Appeal by defendants from order of Judge of County Court of Peterborough granting summary judgment under

Rule 608, in an action to recover \$116.51 for cement sold and delivered, and appeal by defendants from an order of MACMAHON, J., in Chambers, removing stay of execution consequent upon appeal.

J. Bicknell, K.C., for defendants, contended that Rule 608 could not be applied in a case of this kind, citing *Leslie v. Poulton*, 15 P. R. 322; *Molsons Bank v. Cooper*, 16 P. R. at p. 202; *Lake of the Woods Milling Co. v. Apps*, 17 P. R. 496.

O. A. Langley, Lakefield, for plaintiffs, contra.

THE COURT (MULOCK, C.J., ANGLIN, J., CLUTE, J.), held that the fact that the effect of delay would defeat plaintiffs' claim was sufficient to warrant a summary judgment in a case where the debt was due, approving *Kinloch v. Morton*, 9 P. R. 38, and that the judgment could be set aside only on payment into Court of the amount for which judgment was entered.

If the money is paid in within a week, costs of appeal and of motion before MACMAHON, J., reserved until after the trial. In default of payment in, appeal to be dismissed with costs.

BOYD, C.

SEPTEMBER 19TH, 1906.

CHAMBERS.

REX v. FERGUSON.

Police Magistrate—Charge under Ontario Factories Act—Discharge of Accused—Application for Stated Case—Time for Making.

Motion by the Attorney-General for Ontario for an order requiring the police magistrate for the city of St. Thomas to state a case for the consideration of the High Court.

J. R. Cartwright, K.C., for the Attorney-General.

J. B. Davidson, St. Thomas, for the defendant.

BOYD, C.:—The defendant, being charged with a breach of duty under the Ontario Factories Act, was, after hearing

before the police magistrate for the city of St. Thomas, discharged on 14th February, 1906. On 1st March an application was made to the magistrate on behalf of the Attorney-General for Ontario to state a case for the consideration of the High Court of Justice, under sec. 900 of the Criminal Code. This section of the Code has now been made available for the review of all summary convictions under Ontario law by virtue of the amendment made of R. S. O. 1897 ch. 90, as contained in 1 Edw. VII. ch. 13, sec. 2 (O.), which was apparently intended to obviate the difficulty raised in *Regina v. Simpson*, 28 O. R. 531.

The only objection now raised is that the application to state a case should have been made within 10 days after the dismissal. This is based upon an application of the time limit fixed in R. S. O. ch. 90, sec. 9, to the method of appeal or review by way of case stated. In terms, however, that section applies only to appeals to the General Sessions, whereas the provision in the Criminal Code as to case stated to the High Court has no such limitation of time, but provides that the application shall be made and the case stated within such time and in such manner as is directed by Rules under sec. 533 of the Code. No such Rules have been passed, and the result is that the matter should be prosecuted in a reasonable time.

The difficulty raised by the magistrate as to the effluxion of time does not appear to be one that should deprive the Attorney-General of the right given by sec. 900 of the Criminal Code, sub-sec. 5. The order should, therefore, go for the statement of the case forthwith. No costs.

CARTWRIGHT, MASTER. SEPTEMBER 20TH, 1906.

CHAMBERS.

ELGIE & CO. v. EDGAR.

EDGAR v. ELGIE & CO.

CLEMENS v. ELGIE & CO.

Interpleader—Action for—Previous Refusal of Summary Application—Stay of Proceedings in Separate Actions Brought against Interpleading Parties.

After the disposition of an interpleader application in *Re Elgie, Edgar, and Clemens*, ante 33, 299, *Elgie & Co.*, on the

25th June, commenced an interpleader action, and, on the order of a Judge, paid into Court \$730.44 next day. Both defendants duly appeared or accepted service. The defendant Clemens delivered his statement of defence on 8th September. For some reason Edgar allowed the time to elapse, and the pleadings were noted as closed against him. He is applying now for leave to defend if necessary.

On 25th June Edgar commenced an action against Elgie & Co. for \$400; and on 26th June Clemens commenced an action also against Elgie & Co. for more than \$900.

Elgie & Co. set their action down for trial on the non-jury list at Toronto. The venue in the Edgar action was at Bracebridge, and that in the Clemens action at Berlin.

Elgie & Co. now moved to stay the two actions brought against them until their action should be finally disposed of.

F. Arnoldi, K.C., for Elgie & Co.

F. E. Hodgins, K.C., for Edgar.

J. E. Jones, for Clemens.

THE MASTER:—The motion was opposed on several grounds. It was said that the refusal of the interpleader order was *res judicata* as disproving any right on Elgie & Co.'s part to interplead. Even if such a ground can be taken before the Master in Chambers, it is sufficient to note the difference between the two procedures.

On moving for an interpleader order the applicant must shew clearly his right to be rid of all responsibility, and to throw the burden on the claimants. It was only decided on that motion that this right was not so established in face of the opposition of both claimants. In the present action the plaintiffs assume the whole burden of proof, and also not only have brought the money into Court, but are liable for costs to both claimants if their present action fails. It was admitted on the argument that they were perfectly responsible for costs and damages. When the matter is fully and carefully investigated at a trial, it may be held that Elgie & Co. were right after all, and that the claimants should have consented to the order asked for. Then it was said that Clemens having claimed the whole \$730.44 and more, while Edgar only claimed \$400, this shewed that interpleader could not lie. The contrary is distinctly said to be the law in the very

elaborate work of Mr. R. J. Maclellan on Interpleader: see p. 86, where the cases are collected.

Then the very salutary provisions of the Ontario Judicature Act, sec. 57 (12), are always to be applied "so that as far as possible all matters so in controversy between..... parties..... may be completely and finally determined and all multiplicity of legal proceedings concerning any of such matters avoided."

In the present case it would seem discreditable to our system if one action could be proceeding in Toronto, a second at Berlin, and a third at Bracebridge, all involving the same initial question.

Here Elgie & Co. were the first to take proceedings, and if they can prove their claim to a judgment that defendants must interplead, they should certainly be allowed to do so, unless the defendants Clemens and Edgar will in any way be prejudiced thereby.

But I do not see how this can be the case. The powers of the Court were thought sufficiently wide to determine in one action all the matters arising in the curious case of *Morton v. Grand Trunk R. W. Co.*, 8 O. L. R. 370 (see at p. 381), against the opposition of the plaintiffs in the two actions. These powers will certainly have no great difficulty in this case in "the determination of all the matters which must be dealt with before the rights of the parties are finally settled, and that without doing any injustice to any of them:" per Meredith, C.J., at p. 381, *supra*. See, too, Maclellan, at p. 13.

The proper order to make, as I understand it, is as follows. The motion to stay the Edgar and Clemens actions is granted. The defendant Edgar is to be at liberty to deliver such a statement of defence as he may be advised, in 10 days. The defendant Clemens may amend his statement of defence by counterclaim or otherwise as he may desire to do, within the same time.

The costs of this motion will be, as the matter is novel, in the cause, except so far as they have been increased by allowing Edgar in to defend, which must be to plaintiffs in any event.

This order is not to have the effect of delaying the trial of the plaintiffs' action, and the record can be taken out and

amended and returned without any fresh charges, so far as I have power so to order.

I note that Mr. MacLennan (at p. 18) says: "There is nothing in any of the existing interpleader statutes forbidding an action of interpleader." If the refusal of the interpleader order in the present case prevents this action from being brought, that must be set up as a defence to the action, and cannot be dealt with in Chambers so as to have any effect on the disposition of the plaintiffs' motion to stay the other actions.

BOYD, C.

SEPTEMBER 20TH, 1906.

CHAMBERS.

CITY OF TORONTO v. GRAND TRUNK R. W. CO.

Costs—Taxation between Party and Party—Charges for Searches for Documents—Allowances for.

Appeal by defendants the Grand Trunk R. W. Co. from rulings of a taxing officer upon taxation against the appellants of the costs of the plaintiffs and the defendants the Canadian Pacific R. W. Co. The officer allowed to plaintiffs \$150 and to defendants the Canadian Pacific R. W. Co. \$25 for searches for documents made in preparation for trial, and these were the items objected to.

R. C. H. Cassels, for appellants.

W. Johnston, for plaintiffs.

Shirley Denison, for defendants the Canadian Pacific R. W. Co.

BOYD, C.:—In a book of great accuracy it is said that searches for pedigrees and for ancient records, charters, or other documents, may, if successful, be allowed between party and party: Marshall on Costs, 2nd ed., 1862, p. 285. This charge, though not expressly provided for in our tariff of costs, is not necessarily excluded therefrom—it is in fact by the practice of the Courts a recognized item to be allowed in a proper case according to the discretion of the taxing officer. Rule 1,178 makes the tariff conclusive in respect of the matters

thereby provided for, but it does not mean to exclude other charges which may be proper though omitted therefrom.

In *Bastard v. Smith*, 10 A. & E. 213, a charge of £93 paid to a gentleman in the Chapter house for making searches, &c., was allowed, though it was objected to on the ground that it was not properly an item between party and party, to charge for such precautionary measures as searching for evidence.

The distinction is well marked between such instances of successful search for existing evidence in the shape of lost or mislaid documents, and preparation being made for giving evidence by preliminary experiment or investigation. Such was the case of *McGannon v. Clarke*, 9 P. R. 533, where the charges claimed arose in order to qualify one to become a witness. These, unless special provision is made for them by Rule or tariff, are not proper items to be paid by the opposite party. Item 142 of the tariff is perhaps wide enough to cover the case of searches out of Court in different places by competent persons in the case of material documents, which have got astray from the proper custody. But, without explicit directions, it was the practice to allow these searches for existing documents according to the course of the Court in dealing with costs; see this elucidated in *Archbold's Practice*, 14th ed., vol. 1, p. 703, note (u). See *Cherton v. Freeman* 19 W. R. 559.

The documents searched for and found in this case were, it is not disputed, of vital importance, and the efforts made and expenses incurred were reasonable in themselves.

I think that the ruling and allowance of the taxing officer should be upheld, but it is not a case to give costs against the appellants.

SEPTEMBER 20TH, 1906.

DIVISIONAL COURT.

GILLARD v. McKINNON.

Promissory Note—Fraud in Procuring Signatures of Makers—Holder for Value—Suspicious Circumstances—Failure to Make Inquiry—Findings of Jury—Judge's Charge.

Motion by defendants to set aside verdict and judgment for plaintiff for \$11,000, and interest, in an action by the

holder to recover the amount of a promissory note from the makers and indorser. Defences of fraud in the procuring of the note, and of knowledge by the plaintiff of circumstances connected with the note, which either did in fact cause him to suspect the existence of something that would affect the validity of the note, or which were such as should have raised such a suspicion in his mind, and failure to make inquiry, were set up.

The jury found that defendants made the note; that there was no fraud in the procuring of the signatures to the note; that the plaintiff was a bona fide holder for value, and without notice of the circumstances attending the making of the note; and that the plaintiff did not, believing there was fraud in procuring the note, deliberately refrain from inquiring.

G. H. Watson, K.C., for defendants.

G. T. Blackstock, K.C., for plaintiff.

The judgment of the Court (MULOCK, C.J., ANGLIN, J., CLUTE, J.), was delivered by

ANGLIN, J.:—The defendants object to the charge of the trial Judge upon several points, and also maintain that the finding of absence of fraud is against the weight of evidence. But their chief objection is that the trial Judge refused to put questions to the jury to elicit their opinion whether the plaintiff—though he did not believe that the note had been fraudulently procured—in fact suspected that there were some facts affecting its validity, or, if he did not in fact so suspect, whether the circumstances, of which he was aware, were not such as would raise such suspicion in the mind of an ordinarily prudent man; and whether, in either case, he refrained from making such inquiries as he should have made to remove any such suspicion.

Mr. Blackstock's position is that nothing short of proof of suspicion in fact raises a duty of inquiry. Mr. Watson maintains that, if circumstances calculated to arouse suspicion in the mind of an ordinarily prudent man be shewn, though they did not in fact create such suspicion, the duty to inquire arises, and in default of inquiry plaintiff cannot recover.

It seems unnecessary to determine this question, because, upon a careful consideration of all the portions of the evidence relied upon by Mr. Watson, we find no circumstances shewn to have come to the knowledge of plaintiff, which should, in our opinion, have aroused in the mind of an ordinarily prudent man any suspicion of a want of bona fides in the procuring of the note in suit, and certainly nothing upon which a jury could reasonably find that there was in fact such suspicion in plaintiff's mind.

When plaintiff acquired title to the note—as he did on the 24th December—the only circumstances known to him were that a notq for \$11,000, drawn at one year at 6 per cent., bearing signatures of 7 makers and an indorser, in form perfectly regular, was presented to him for discount with the recommendation of his most intimate friend, Mr. Ballantyne. Mr. Ballantyne gave him a plausible explanation of the fact that the note was to be negotiated so far from the homes of the parties to it. The plaintiff, it is true, hesitated to make the advance—says he decided that he would not do so without knowing more of it. His only doubt, apparent from the evidence, was as to the financial sufficiency of the parties to the note. To ascribe to him doubt upon any other point would be sheer conjecture. It is impossible to say that inquiry to remove the doubt shewn by the evidence would have led to knowledge of any of the circumstances attendant upon the making of the note. To impute to the plaintiff knowledge of these circumstances would be to charge him with knowledge which he would not, unless accidentally, have acquired, had he made the inquiry appropriate to remove the doubt in his mind. But plaintiff saw Ballantyne (who had come from Montreal to Stratford), and, upon his assurance merely that the parties to the note were financially sufficient to insure payment, his hesitation disappeared, and he gave his cheque for the face amount of the note. He also admits that he thought Ballantyne, though not a party to it, had some personal interest in the discounting of the note.

We cannot find in these circumstances anything which should have aroused in the mind of an ordinarily prudent man a suspicion that the note was fraudulently or irregularly procured, or that its validity was in any respect open to question, certainly not anything from which a jury could reasonably infer that there was actually such a suspicion in plaintiff's mind.

There was, therefore, we think, nothing upon which a finding could be based of conditions raising a duty on the part of plaintiff to make inquiries. There was, in our opinion, no evidence proper to submit to the jury upon the questions which counsel for the defendants urges should have been put to them.

It is unnecessary, therefore, to consider the other points raised at bar, though we should, perhaps, state that, after considering the evidence, we remain unconvinced that any of the findings of the jury should be disturbed because against the evidence.

The defendants' motion fails and will be dismissed with costs.

BOYD, C.

SEPTEMBER 21ST, 1906.

CHAMBERS.

WOODRUFF CO. v. COLWELL.

Company—Parties to Action—Authority to use Name—Solicitor—Meeting of Shareholders.

Appeal by defendant from order of Master in Chambers (ante 302) dismissing motion to strike out the name of the company as plaintiffs, and for security for costs.

C. A. Moss, for defendant.

W. E. Middleton, for plaintiffs.

BOYD, C., dismissed the appeal; costs in the cause. If defendant gives security, plaintiffs to give security in like amount.

BOYD, C.

SEPTEMBER 21ST, 1906.

CHAMBERS.

MCRÆ v. BALLANTYNE.

Writ of Summons—Service out of Jurisdiction—Motion to set aside—Grounds—Res Judicata—One Defendant in Jurisdiction—Conditional Appearance.

An appeal by defendants Ballantyne and Lowell & Christmass from order of Master in Chambers (ante 289) dismissing

motion to set aside service of writ of summons out of the jurisdiction, and order permitting such service.

G. T. Blackstock, K.C., for appellants.

G. H. Watson, K.C., for plaintiffs.

BOYD, C.:—Upon the affidavits and material before me it does not appear expedient to deal with all the large questions raised by the appellants. The consideration of them will more fitly come up at a later stage. It should be open for the appellants to raise the question when the pleadings are complete as to the cause of action alleged being *res judicata* as to the co-defendant McKinnon, and if this is made to appear it should be also open to the appellants to raise the question as to the competency of the Court to deal with the cause of action as it is to be made out against the other defendants. At present it seems to me that the order to serve out of the jurisdiction is maintainable because one of the defendants, McKinnon, is within the jurisdiction—but if the action is vexatious as to him, this reason for upholding jurisdiction as to the others disappears. I would also allow the appellants to enter a conditional appearance. It is no doubt premature to discuss the method of trial, but it may be found not to be a fit case for a jury.

Order accordingly and costs in cause.

SEPTEMBER 24TH, 1906.

DIVISIONAL COURT.

LUCAS v. PETTIT.

Animals—Escape of Bees from Defendant's Land—Injury to Property of Plaintiff—Negligence—Scienter—Liability—Findings of Jury.

Motion by defendant to set aside the findings of the jury at the trial of this action before MAGEE, J., and the judgment entered for plaintiff thereon, and to enter judgment for defendant.

The action was brought for injuries caused by bees of defendant.

G. Lynch-Staunton, K.C., for defendant.

W. S. McBrayne, Hamilton, for plaintiff.

The judgment of the Court (MULOCK, C.J., ANGLIN, J., CLUTE, J.), was delivered by

MULOCK, C.J.:—The defendant was the owner of 160 or 170 hives of bees, which he placed in a small yard situate within about 20 feet of the highway, running east and west. At the southerly end of this yard was a small building with a frontage of about 24 feet on the highway, about 18 feet in depth and 17 feet in height. From north to south the yard occupied by the hives was about 124 feet in length. Immediately opposite this yard on the south side of the road was plaintiff's property consisting of a field of about 8 acres, which was in oats, and beyond it another field in buckwheat. The highway is about 56 feet in width. On 10th August, 1905, plaintiff proceeded to the oat field with a pair of horses and a binder for the purpose of cutting the oats, when the horses were attacked by a large number of bees. The horses ran away from plaintiff, dragging the binder with them to the south end of the field, and there stopped at the fence.

Plaintiff followed them and endeavoured to unhitch and take them away, but was unable to make them move. He himself was being similarly attacked and made his escape by immersing himself in a neighbouring pool of water, and covering the exposed portions of his body with mud. One of the horses died almost at once in the field from the effect of the stings, and the other succumbed within 2 or 3 days. Plaintiff himself suffered severely, and was under medical treatment.

The questions put to the jury and their answers are as follows:—

1. Were the plaintiff Lucas and his horses injured by bees engaged in ordinary flight or work, or by the swarming of a colony of bees? Ordinary flight.

2. If they were injured by bees engaged in ordinary work and flight were those the defendant's bees? A. Yes.

3. If the plaintiff and his horses were injured by the swarming of a colony of bees had the bees swarmed from the defendant's colony? A. No answer.

4. Had the defendant reasonable grounds for believing that his bees were more dangerous than ordinary bees? A. Yes.

5. Had the defendant reasonable grounds for believing that his bees were, by reason of the situation of his hives, or their numbers, dangerous to persons or horses upon the highway or elsewhere than on the defendant's premises? A. Yes.

6. At what sum do you assess the damages of the plaintiff if the defendant be liable for damages? A. \$400.

On these findings the trial Judge entered a judgment for plaintiff for \$400.

There is abundance of evidence, I think, for the findings of the jury, and the question is whether they warrant the judgment in question.

It was estimated that the strength of a hive was between 15,000 and 50,000 bees, and the plaintiff speaks of them as attacking the horses and himself in clouds. He estimated that there were more than 4 bushels of bees on the horses and in the air. This, of course, is a mere estimate, but it is clear that the number of defendant's bees was very great.

For the defence it was contended that defendant was guilty of no negligence, and that there was no evidence that the bees were of a vicious nature, and that defendant was not aware of any viciousness or propensity on the part of the bees to attack mankind or animals.

The doctrine of scienter or "notice of mischievous propensities" of the bees has, I think, no application to this case, nor could the absence of negligence, in the sense pressed upon us, relieve defendant of liability. The facts shew that defendant placed a very large number of hives of bees within 100 feet of plaintiff's land, and that in the course of their ordinary flight between the hives and plaintiff's field of buckwheat they would pass directly over plaintiff's intervening field of oats, where it was necessary for plaintiff to be for the purpose of harvesting the same.

The right of a person to enjoy and deal with his own property as he chooses is controlled by his duty to so use it as not to affect injuriously the rights of others, and in this case it is a pure question of fact whether defendant collected on his land such an unreasonably large number of bees, or placed them in such position thereon as to interfere with the reasonable enjoyment of plaintiff's land. I think the reasonable deduction from the answer of the jury to question 5 is that the bees, because of their numbers and position on defendant's land, were dangerous to plaintiff, and also that de-

fendant had reason so to believe. In my view, it is immaterial whether or not defendant, in these circumstances, regarded the bees as dangerous. If he was making an unreasonable use of his premises, and injury resulted therefrom to plaintiff, he is liable.

It was defendant's right to have on his premises a reasonable number of bees, or bees so placed as not to unfairly interfere with the rights of his neighbour, but, if the number was unreasonable, or if they were so placed as to interfere with his neighbour in the fair enjoyment of his rights, then what would otherwise have been lawful, becomes an unlawful act. In this case the jury found as a matter of fact that the bees, because of their number and situation, were dangerous to plaintiff. Defendant was acting unlawfully, and he is liable for injury flowing directly from such unlawful act: *O'Gorman v. O'Gorman*, [1903] 2 I. R. 573; *Farrer v. Nelson*, 15 Q. B. D. 260.

Appeal dismissed with costs.

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SEPTEMBER 21ST, 1906.

DIVISIONAL COURT.

O'SULLIVAN v. DONOVAN.

Company—Shares—Issue of Certificate—Payment by Promissory Note—Estoppel—Action to Cancel Shares—Status of Shareholder as Plaintiff—Right of Action—Payment of Promissory Note Pendente Lite—End of Cause of Action—Costs—Summary Application.

Appeal by plaintiff from judgment of BRITTON, J. (7 O. W. R. 78), dismissing action by a shareholder in the Pure Colour Company Limited (one of the defendants), brought to have it declared that 30 shares of the stock of the company for which a certificate (as fully paid up shares) was issued to defendant Donovan, were not in fact fully paid up, and for the delivery up and cancellation of the shares and certificate, and for indemnity by defendant Donovan to defendants the Pure Colour Co. against liability as the indorser of a promissory note given by Donovan for the price of the shares, which note had been discounted and was held by a bank at the time of the commencement of the action.

BRITTON, J., held that plaintiff had no status to maintain the action.

A. O'Heir, Hamilton, for plaintiff, contended that the transaction was illegal and ultra vires, as it amounted to a purchase of the stock by the company.

H. H. Bicknell, Hamilton, for defendants, contra.

THE COURT (MULOCK, C.J., ANGLIN, J., CLUTE, J.), held that plaintiff had a cause of action at the time the action was begun, and reversed the judgment of the trial Judge; but they were of opinion that the cause of action was at an end when defendant paid the promissory note given for part of the price of his shares, and that either party might then have applied summarily for an order disposing of the costs: *Eastwood v. Henderson*, 17 P. R. 578.

Appeal allowed. Plaintiff to have costs up to time of payment, fixed at \$300. No further or other costs to either party.

TEETZEL, J.

SEPTEMBER 24TH, 1906.

WEEKLY COURT.

RE CEMENT STONE AND BUILDING CO.

EGAN'S CASE.

Company—Winding-up—Contributory — Director — Entries in Register—Resolution of Directors—Attempt to Get Rid of Liability.

Appeal by Samuel Egan from decision of Master in Ordinary in a winding-up matter, ante 260.

W. E. Middleton, for appellant.

W. J. McWhinney, for the liquidator.

TEETZEL, J., reversed the decision of the Master and allowed the appeal, but without costs.

CARTWRIGHT, MASTER.

SEPTEMBER 25TH, 1906.

CHAMBERS.

SYMON v. GUELPH AND GODERICH R. W. CO.

Parties—Joinder of Defendants — Pleading — Statement of Claim—Joint or Several Cause of Action — Master and Servant—Injury to Servant—Joint Employment — Particulars—Rule 192.

Action against the Guelph and Goderich Railway Company, the Canadian Pacific Railway Company, and the Can-

ada Foundry Company jointly. The statement of claim stated that plaintiff was employed by the Canadian Pacific Railway Company to work upon the construction of a line of railway which was being constructed by the Canadian Pacific Railway Company under the name of the Guelph and Goderich Railway, but which was leased and operated by the Canadian Pacific Railway Company; that during the progress of the work it became necessary to erect a steel bridge across the Grand river, and the Canada Foundry Company agreed with the other defendant companies to construct the bridge; that plaintiff was ordered by his employers to assist in this work, and did so; that defendants undertook the placing of the necessary girder, and plaintiff assisted in this on his employers' orders; that the work of laying the girder was so negligently done that plaintiff was seriously injured; that all the apparatus used in placing the girder, including the roadbed upon which the cars rested, were under the control of "the defendants;" and that they were negligent in not providing a suitable and safe roadbed, as well as other proper and efficient apparatus. Certain specific defects were pointed out in the derrick used in laying the girder, and in the place adopted for that purpose. In the last paragraph it was said that "the said accident happened by reason of the said negligence of the said defendants, and by reason thereof the plaintiff suffered the injuries herein complained of."

On this defendants the Guelph and Goderich Railway Company moved for an order requiring plaintiff to elect against which defendant he would proceed, or else to amend his statement of claim, or furnish particulars.

Plaintiff, without waiting for the motion to be heard, furnished full particulars.

Defendants the Canadian Pacific Railway Company moved for a similar order.

Shirley Denison, for both defendant railway companies.

R. H. Greer, for the Canada Foundry Company.

Hugh Guthrie, K.C., for plaintiff.

THE MASTER:—The only question at present is, whether the statement of claim sufficiently alleges a joint cause of action against all three defendants.

The defendants relied on *Hinds v. Town of Barrie*, 6 O. L. R. 656, 2 O. W. R. 995, and *Grandin v. New Ontario S. S. Co.*, 6 O. W. R. 553.-

The plaintiff cited Rule 192. But if he was obliged to rely on this he must fail, as is shewn in *Quigley v. Waterloo Manufacturing Co.*, 1 O. L. R. 606. . . .

Here in the last paragraph, as confirmed by the particulars, there is *prima facie* a joint cause of action alleged. Whether or not this can be proved at the trial so as to maintain this assertion is not now to be determined. In disposing of the motion, however, the particulars given by plaintiff cannot be overlooked, as they must be considered as amendments of the statement of claim when furnished at this stage of the action: see *Smith v. Boyd*, 17 P. R. at p. 467; *Milbank v. Milbank*, [1900] 1 Ch. 384; *Temperton v. Russell*, 9 Times L. R. 319 (per Bowen, L.J.)

Here, if looked at in the most unfavourable light, the particulars . . . might seem to set up a joint cause of action in respect of the roadbed against all the defendants, and a separate cause of action against the foundry company in respect of the derrick. From the view of Rule 192 taken by plaintiff's counsel, he, no doubt, thought that these, even if different causes of action, could be joined.

It might have been better to have waited before giving particulars. The motive of the haste was, no doubt, the desire to get to trial at Guelph assizes next week, if possible. As the statement of claim itself stands, "the defendants" spoken of throughout must be all the defendants. This, so far as the roadbed is concerned, is not qualified by the particulars, and in the following paragraphs there is a sufficient allegation of joint liability for plaintiff's injury.

There might have been less difficulty in disposing of the motion if these particulars had not been furnished.

Even as the matter stands, it does not seem necessary to read the statement of claim in the light of the particulars so as to require plaintiff to elect. In paragraph D. of the particulars plaintiff charges that all the defendants were engaged and concerned in placing the girder; and in paragraph F. that all the defendants are responsible for the condition of the roadbed, and that in other respects (i.e., I

suppose the derrick and its management) the foundry company are referred to.

This latter part is ambiguous. It may, however, be taken to mean only that the foundry company were in charge of this part of the joint operations, in view of the statement of claim and the particulars, as a whole.

In any case the present motion will not have been useless. The plaintiff will perhaps find that if he succeeds in the action he will do so as being the servant of all the three defendants and can only recover damages accordingly. If it was a joint work it must have been a joint employment.

It was said in one case by Bowen, L.J., that one party could not dictate to the other how he was to plead. And in *Hinds v. Town of Barrie*, 6 O. L. R. at p. 660, Osler, J.A., expressed his regret that the authorities required plaintiff to elect, and gave "liberty to amend by setting up, if she can, a joint cause of action."

It therefore seems right to dismiss the motions with costs in the cause. Defendants should plead within a week after the issue of this order. Plaintiff, if he desires to do so, can amend his particulars and statement of claim. This should be done before the order is issued, so that defendants may know what case they have to meet.

If plaintiff is not making any separate claim against the foundry company, this might be recited in the order, and so any amendment by plaintiff may be unnecessary if he is prepared to stand by his pleadings in their present shape.

CARTWRIGHT, MASTER.

SEPTEMBER 26TH, 1906.

CHAMBERS.

RE BANK OF TORONTO AND DICKINSON.

Interpleader—Money Deposited in Bank to Credit of Three Executors—Right of Two to Withdraw—Dispute—Right of Bank to Interplead—Bank Act.

Motion by the Bank of Toronto for an interpleader order.

H. E. Rose, for the bank.

Job Dickinson was not represented.

H. J. Scott, K.C., for the other two executors.

THE MASTER:—The facts, which are not in dispute, are as follows. There is a sum of \$1,060.97 standing to the credit of "the executors of the estate of the late Job Dickinson." Of the will dealing with this estate William, Elias, and Job (the younger) are the three executors, and the amount in question was deposited to the credit of the account by cheques signed by all three of the executors.

On 2nd June last Job Dickinson served a formal written notice on the bank forbidding them to pay out any of the moneys except on a cheque signed by all three executors. Subsequently two cheques, both dated 27th March, for \$1,000 and \$19.32 respectively, were presented. They were not signed by Job Dickinson, and were therefore refused. Elias Dickinson has instituted a Division Court action against the bank for non-payment of the \$19.32 cheque.

No authority on the exact point was cited by either counsel, nor have I been able to find any in our own Courts. No doubt, on the one hand, it is competent for one executor to act by himself so long as he is acting in good faith. On the other hand, it would seem against reason that a bank, being in no way interested in the matter, should be put in peril because executors have fallen out.

It would seem that the provisions of the Bank Act may properly be extended to the present case. Section 65, subsec. 2, allows repayment of deposits on the receipt of a majority if standing in the names of more than two persons, "except only in the case of a lawful claim by some other person before repayment." The present case seems to come within this reservation. A lawful claim must be taken to mean one which is *prima facie* substantial.

This was apparently the view taken by my predecessor in a case of *Dollery v. Dominion Bank*, decided by him in June or July, 1899 (see Chambers judgment book, vol. 37, p. 144).

In the present case the bank are wholly blameless. And unless it can be successfully contended that a deposit receipt is materially different from a current account, I think the bank are entitled to such an order as was made in the *Dollery* case.

If the parties are willing, the money can be retained by the bank as if it was in Court. Probably the three executors will be able to adjust their difficulties and to agree in the management of the estate without any further litigation.

I have also been referred to a case of *Gollis v. Dominion Bank*, decided by Meredith, C.J., in July, 1903. . . . See, too, *Morse on Banking*, 4th ed., vol. 2, sec. 438, and cases cited; also vol. 1 of same work, sec. 342, first clause.

CARTWRIGHT, MASTER.

SEPTEMBER 27TH, 1906.

CHAMBERS.

CANAVAN v. HARRIS.

Discovery—Examination of Defendant—Refusal to Answer Questions—Relevancy—Pleading—Statement of Claim.

Action by the widow of the late John Canavan to recover damages for his death. It was alleged that the deceased was run over by a servant of the defendants who was acting within the sphere of his ordinary duties.

In the 5th and 6th paragraphs of the statement of claim it was charged that defendants' servant was intoxicated at the time of the accident, and had been for some time previous of unsteady habits and frequently intoxicated, and was not fit to be intrusted with the business of defendants, as they well knew.

The statement of defence denied formally all the material allegations of the statement of claim. It then alleged that the deceased was the cause of his own death, or else that it was inevitable accident.

This statement of defence was delivered on 4th September.

The defendant John B. Harris was examined for discovery on 18th September. He refused to answer questions directed to sustain the allegations in the statement of claim of the defendants' servant having been addicted to the use of intoxicating liquor, to the knowledge of defendants, prior to the accident.

The plaintiff now moved for an order requiring defendant John B. Harris to attend again and answer the questions.

W. T. J. Lee, for plaintiff.

W. R. Riddell, K.C., for defendants.

THE MASTER:—I think the motion must succeed, and the questions should be answered. As long as paragraphs 5 and 6 appear in the statement of claim, plaintiff is entitled to have full discovery in regard to them.

Every fact material to his case on which a party relies is to be stated in his pleading, and evidence of all such facts can be given at the trial. If any fact is stated as a ground of action or defence which the other side considers irrelevant, and therefore embarrassing, he should move to strike it out. This was done in such cases as *Flynn v. Toronto Industrial Exhibition Association*, 2 O. W. R. 1047, 1075, 6 O. L. R. 635, and *Gloster v. Toronto Electric Light Co.*, 4 O. W. R. 532. Whether or not such a motion would succeed in the present case I have not now to consider. . . .

If alleged facts are material, they can be proved at the trial. If not material, they should be struck out unless clearly introductory or incapable of affecting the result.

SEPTEMBER 27TH, 1906.

DIVISIONAL COURT.

MILLER v. BEATTY.

Water and Watercourses—Dam—Flooding Lands of Riparian Owner—Cause of Injury—Damages—Release—Statutory Powers.

Appeal by plaintiff from judgment of ANGLIN, J., 7 O. W. R. 605, dismissing the action with costs.

R. McKay, for plaintiff.

E. E. A. Du Vernet, for defendants.

THE COURT (FALCONBRIDGE. C.J., BRITTON, J., CLUTE, J.), dismissed the appeal with costs.

CARTWRIGHT, MASTER.

SEPTEMBER 28TH, 1906.

CHAMBERS.

LONDON AND WESTERN TRUSTS CO. v. LUSCOMBE.

Third Party Procedure—Winding-up of Company—Action by Liquidators against Directors for Paying Dividends out of Capital—Bringing in Shareholders who Received Dividends as Third Parties.

Motion by defendants for order for trial of third party issue.

W. E. Middleton, for defendants.

Featherston Aylesworth, for third parties.

G. S. Gibbons, London, for plaintiffs.

THE MASTER:—The action is brought by the liquidators of the Birkbeck Loan Company, alleging that the defendants, who were directors of the insolvent company, improperly paid dividends out of capital, and to compel them to refund such amounts so improperly paid.

Two of the defendants obtained the usual third party order. They claim to be indemnified by the shareholders for any such money paid to shareholders, and two of the shareholders have been made third parties, as test cases.

It was contended by the third parties and the plaintiffs that the order should be discharged. It was not denied that there were 126 shareholders on the date of the Winding-up order, and that during the last 6 years there have been 48 transfers of shares.

The following cases were cited: Wye Valley R. W. Co. v. Hawes, 16 Ch. D. 489; Fritchhoff's Case, 21 Ch. D. 520; Moxham v. Grant, [1900] 1 Q. B. 88; Davey v. Cory, [1901] A. C. 477.

These cases seem to shew that there is authority to issue the third party notice; that such an order should not be made

as "will hinder or embarrass the plaintiff in the prosecution of the action;" that if the shareholders or any of them had knowledge of the facts alleged against the defendants they would be liable to indemnify the directors.

The course taken by the defendants here seems to avoid the ground on which the third party notice was refused in the Wye Valley Railway case.

If it is the fact that all the shareholders are in the same position as the two now brought in, then it is not improbable that so many of the others as are solvent will abide by the result of the present procedure. In this way there will perhaps be effected a consolidation of 180 possible actions before they have begun (if such an expression may be allowed). This will certainly be so if the defendants succeed in obtaining an order for representation of the other shareholders by the two now brought in. At present I think the usual order should issue for the trial of the third party issues.

I do not see that the third parties can complain, as Moxham v. Grant, *supra*, shews that the liquidators might have sued every one who had received part of these dividends, if it had been thought best to do so, instead of attacking the directors.

TEETZEL, J.

SEPTEMBER 29TH, 1906.

CHAMBERS.

TITTERINGTON v. DISTRIBUTORS CO.

Company — Winding-up — Action begun before Winding-up Order—Leave to Proceed—Special Circumstances.

Motion by defendants the Bank of Hamilton to rescind an order obtained by plaintiffs allowing this action to proceed, notwithstanding an order for the winding-up of the defendant company.

Britton Osler, for defendants the Bank of Hamilton.

Grayson Smith, for plaintiffs.

J. A. Macintosh, for the liquidator of the defendant company.

TEETZEL, J.:—A winding-up order with a reference to the Master in Ordinary was made after the announcement of the action. On 18th September plaintiffs, upon notice to the liquidator of the defendant company, but without notice to defendants the Bank of Hamilton, obtained an order from the Chancellor, sitting in Chambers, giving leave to the plaintiffs to proceed with the action . . . notwithstanding the issue of the order to wind up the defendant company.

The defendants the Bank of Hamilton claim to be assignees of unpaid calls on the stock in the defendant company subscribed by the plaintiffs and others. The claim indorsed on the writ is to set aside plaintiffs' subscription for stock in the company, upon the grounds of misrepresentation and failure of consideration, and because conditions precedent to the same have not been carried out, also for a declaration that the assignment to the bank . . . is invalid and inoperative as against plaintiffs.

After the order of 18th September was settled, but before its entry, the Chancellor, on application of the Bank of Hamilton, granted leave for a motion . . . to set aside the order made by him.

The bank, as the principal creditors of the insolvent company, and holding assignments of unpaid calls as security for their claim, are chiefly interested in saving time and expense in ascertaining the validity of the stock subscriptions.

The Master in Ordinary has all the powers of a High Court Judge in the winding-up proceedings, and disputes between stockholders and the liquidator can be much more cheaply and expeditiously disposed of before him than in an action.

It seems to me that to entitle a plaintiff to an order allowing him to proceed with an action, he should shew such special or unusual circumstances as make it reasonably clear that the matters in question cannot be satisfactorily dealt with by the tribunal specially provided in the winding-up proceedings.

In this case no such special or unusual circumstances are disclosed.

The order of 18th September will, therefore, be rescinded, so far as respects the claim in reference to plaintiffs' stock subscription, but, if so advised, plaintiffs may amend and proceed against the bank alone for a declaration that the assignment to the bank is itself illegal and void as against plaintiffs.

No order as to costs.

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BOYD, C.

OCTOBER 1ST, 1906.

TRIAL.

WILLIS v. BELLE EWART ICE CO.

Master and Servant—Injury to Third Person by Negligence of Servant—Responsibility of Master—Servant in Charge of Master's Vehicle, but Departing from Course of Employment—Negligence.

Action for damages for injuries sustained by plaintiff, owing to the alleged negligence of a driver of an ice waggon in the employment of defendants, resulting in a collision with a motor-bicycle upon which plaintiff was travelling in a public street in the city of Toronto.

F. Arnoldi, K.C., for plaintiff.

B. H. Ardagh, for defendants.

BOYD, C.:— . . . The waggon was driven by a man called Leslie, who had been for some days in defendants' employment, and was accounted a sober, steady man. The accident occurred between 8 and 9 p.m. on 10th October, 1905.

The main business was to take a load of ice and distribute it to customers of defendants, who lived on a fixed route in the western part of the city south of Queen street. The driver's duty was to start from defendants' barns on the east side of Jarvis street, south of the Esplanade, about 8 in the morning, and to return after delivering the ice along his beat, which in due course would take till about 4 or 5 in the afternoon.

On this day all the ice had been delivered apparently, but no trace is given of the driver's movements from the completion of his day's trip in delivery till a short time before the accident. But shortly before the collision, about 8 p.m., he was seen driving his waggon (at a good gait, galloping) west along College street towards the Junction. He drove past Clinton street and past Montrose avenue, and then turned round, crossing College street, and made a sharp, rapid cut to the north at the west corner of Montrose avenue, when his shaft struck plaintiff and his motor, as he was going west along the north side of College street. The driver was on the wrong side of the road, and should have made the crossing by a wide turn to the south of College street so as to reach the east side of Montrose avenue. He was far gone in liquor, cantankerous and full of fight. Next morning he could give the defendants no account of what had happened, and was discharged.

The defence relied on is, that defendants are not responsible for the act of the servant, as he had ceased to be acting in the course of his employment at the time of the disaster. In my opinion, all the circumstances point in this direction. The driver had forgotten the call of duty, failed to go back to the barns with his team after the day's work, drove elsewhere in search of liquor, and was seen befuddled and bellicose on a street entirely out of the homeward course, and hurrying away from his proper destination just upon the happening of the accident. The terse language of Parke, B., in *Joel v. Morrison*, 6 C. & P. 501, fits the situation: "He was going on a frolic of his own without being at all on his master's business." The governing law is given in the modern leading case of *Storey v. Ashton*, L. R. 4 Q. B. 476, which has been followed and applied in *Sanderson v. Collins*, [1904] 1 K. B. 628, and *Cheshire v. Bailey*, [1905] 1 K. B. 237, 245.

Any departure of the servant for his own purposes from the discharge of his ordinary duties would relieve the master from responsibility. From the time that the driver (having disposed of the load of ice) delayed returning to defendants' stables, and drove about to enjoy himself, he had in effect discharged himself. He was then at large on a drunken bout, and himself alone liable for his tortious acts.

Merritt v. Hepenstal, 25 S. C. R. 150, cited for plaintiff, is broadly distinguishable. There the driver, though he had

for a time abandoned the master's business, had returned to it before and at the time of the accident.

The action must be dismissed, and the \$30 in Court returned to defendants, but I hope they will be soulful enough not to ask for costs.

OCTOBER 1ST, 1906.

DIVISIONAL COURT.

CITY OF TORONTO v. GRAND TRUNK R. W. CO.

Costs—Taxation between Party and Party—Charges for Searches for Documents—Allowances for.

Appeal by defendants the Grand Trunk R. W. Co. from order of BOYD, C., ante 310.

R. C. H. Cassels, for appellants.

W. Johnston, for plaintiffs.

Shirley Denison, for defendants the Canadian Pacific R. W. Co.

The Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.), dismissed the appeal with costs.

OCTOBER 1ST, 1906.

C.A.

McBAIN v. WATERLOO MANUFACTURING CO.

Master and Servant—Injury to Servant—Dangerous Machine—Absence of Guard—Factories Act—Proximate Cause of Injury—Negligence—Damages.

Appeal by defendants from order of a Divisional Court affirming judgment of MACMAHON, J., after a trial without a jury, awarding plaintiff \$1,200 damages for injuries received while working in defendants' employment.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

E. E. A. DuVernet and J. C. Haight, Waterloo, for defendants.

W. M. Reade, Waterloo, for plaintiff.

MOSS, C.J.O.:—On the argument of the appeal defendants alleged that, acting on the intimation of the trial Judge given at the trial, that, if possible, he would, before disposing of the case, make a personal examination of the machinery which caused the injury, they abstained from giving evidence as to the condition of the machinery before and at the time of the accident. We thought it proper to afford them an opportunity of producing such evidence, and we directed that defendants be at liberty to adduce it before the Judge of the County Court of Waterloo. The evidence was not taken, and defendants now intimate that, owing to changes in the buildings and machinery which they have made since the trial, they are unable to produce any useful evidence, and that the case will have to stand for decision as it was when argued.

It remains, therefore, to dispose of the case upon the present record.

By a somewhat singular combination of circumstances, plaintiff was thrown backwards into the gearing of a machine and roller for the bending of boiler plates. There is no doubt that he was lawfully working in the place where he was, near by the unprotected side of the machine into which he fell. At the moment of his fall the gearing was not in motion, but in his efforts to extricate himself he set the gearing in motion to an extent sufficient to inflict the injury of which he complains.

The trial Judge came to the conclusion that the machine was a dangerous one, and should have been guarded on the side where the accident happened, as in fact it was guarded on the other side, and that it could easily have been guarded at a small cost.

Upon the evidence as it stands there is no good ground for interfering with the findings of the trial Judge, affirmed as they have been by the Divisional Court.

Nor is there any sufficient reason for thinking that the absence of the guard was not the proximate cause of the

accident. The guard might not have prevented plaintiff from being taken off his feet as he was, but with a guard he could not have fallen into the gearing or got his arm entangled in and squeezed by it in the way shewn.

There appears no fair escape from the . . . conclusion that the blame for the accident rests upon the defendants' neglect to comply with the provisions of the Factories Act. And upon the authorities it follows that plaintiff is entitled to claim compensation from defendants for the injury which he sustained by reason of such negligence on their part: *Sault Ste. Marie Pulp and Paper Co. v. Myers*, 33 S. C. R. 23; *Moore v. Moore*, 4 O. L. R. 167, 1 O. W. R. 290; *McIntosh v. Firstbrook Box Co.*, 8 O. L. R. 419, 3 O. W. R. 924, 10 O. L. R. 526, 6 O. W. R. 237.

The damages awarded are not excessive, having regard to the nature of the injuries and their effect upon the permanent usefulness of the arm. The medical gentlemen who testified at the trial as to its condition were unable to hold out hopes of its ever becoming as strong or as useful as before.

Appeal dismissed with costs.

OSLER and MEREDITH, JJ.A., gave reasons in writing for the same conclusion.

GARROW and MACLAREN, JJ.A., also concurred.

OCTOBER 1ST, 1906.

C.A.

McLEOD v. LAWSON.

Damages—Interlocutory Injunction—Dissolution—Time for Applying for Reference—Evidence—New Agreement—Costs—Stay of Proceedings—Appeal.

Motion by defendant Lawson to vary judgment of 29th June, 1906 (ante 213), by directing a reference as to damages occasioned by interlocutory injunctions, and by reserving

Lawson's right to claim a renewal agreement from defendant Thomas Crawford, and also as to costs.

The motion was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

W. M. Douglas, K.C., for defendant Lawson.

J. B. Holden, for plaintiffs.

R. McKay, for defendant John McLeod.

W. N. Ferguson, for defendant Crawford.

Moss, C.J.O.:—I. Where in an action the plaintiff obtains an interlocutory injunction on the usual undertaking as to damages, and the injunction is afterwards dissolved or the action is dismissed at the trial, there is no absolute rule as to the time within which an application should be made for a reference as to the damages, if any, the defendant has sustained. But it is good practice to make it either at the time the injunction is dissolved or at the trial: Kerr on Injunctions, 4th ed., p. 592, and cases cited; Holmsted & Langton, 3rd ed., pp. 94, 95, and cases cited.

Here no application was made at the trial, but if it had been made it would not have been successful, for the trial Judge did not dissolve the injunction.

As the result of the appeal is to dissolve the injunction, it is now proper for defendant Lawson to apply to this Court, and this Court may, if the case is a proper one, direct the inquiry in the usual form.

There seems no good reason why this should not be done. The proper form of reference seems to be, whether defendant Lawson sustained any, and what damages, by reason of the orders of 20th and 27th July, 1905, having been made, which plaintiffs ought to pay according to the undertakings contained in the orders.

The inquiry ought not to be confined to the first order owing to the slip or omission in the notice of motion.

II. There can now be no alteration of the record by the introduction of further evidence. If it be the case that the question of a new agreement between defendants Lawson and Thomas Crawford was not in issue, or if the conclusions of fact upon that question on the record as it now stands be erroneous, it is open to defendant to point that out in his

appeal to the Supreme Court of Canada. If what has been put forward on this application is all the proposed further evidence, it does not appear to be distinct or definite enough to effect any change in the findings. But in any event defendant is not prejudiced by leaving the record in its present condition.

III. As to the costs of the application to remove the stay of proceedings and the appeal from the order made, the course taken by the Court of expediting the hearing of the main appeal obviated the necessity for any discussion upon the lesser. And there should be no order except that there be no costs of the application or the appeal.

IV. The costs of the appeal should remain to be borne by plaintiffs as directed. The appeal was against the judgment in their favour obtained in their action. One of the respondents (John McLeod) is a person of unsound mind, and Thomas Crawford was maintaining a separate appeal, for the costs of which he has been made liable. They were necessary parties to Lawson's appeal, but he does not ask any variation of the direction as to costs.

No costs of this application.

MEREDITH, J.A., gave reasons in writing for the same conclusion.

OSLER, GARROW, and MACLAREN, JJ.A., also concurred.

OCTOBER 1ST, 1906.

C. A.

AMES v. CONMEE.

Broker—Purchase of Shares for Customer on Margin—Moneys Advanced to Keep up Margins—Recovery—Instructions—Usual Course of Dealing—Practice of Brokers—Discharge of Customer—Obligation of Broker to Sell—Several Orders Included in One Contract — Interest — Hypothecation of Shares by Broker—Commission.

Appeal by defendant and cross-appeal by plaintiffs from order of a Divisional Court, 10 O. L. A. 159, 6 O. W. R. 89,

affirming judgment of *BOYD, C.*, 4 O. W. R. 460, in favour of plaintiffs.

The appeal was heard by *MOSS, C.J.O.*, *OSLER, GARROW, MACLAREN, J.J.A.*, *STREET, J.*

C. Millar, for defendant.

W. N. Tilley, for plaintiffs.

OSLER, J.A.:—The ground of defence chiefly relied upon before us is that which *Anglin, J.*, considers in his written judgment, namely, that there was a conversion by plaintiffs of defendant's stock by the pledging of it not merely for the amount which remained unpaid thereon by defendant, and which plaintiffs had advanced on his account, but also for their own general indebtedness to the bank. This, if true, would not be an answer to the action, though it might result in considerably reducing the amount which plaintiffs have been held entitled to recover, if the stock was, at the date plaintiffs pledged it, of any substantial value.

I do not think that there is any real difference between the Judges of the Divisional Court on the point of law. Their diverse conclusions seem to have arisen from the different views they took of the effect of the evidence, the majority holding it to have substantially proved that plaintiffs, notwithstanding the hypothecation referred to, were always ready and able to deliver his stock to defendant, had he come in to redeem it, while *Anglin, J.*, thought the evidence was not sufficiently clear and definite to warrant that conclusion.

On the whole, after a careful consideration of the evidence, I see no reason to differ from that view of the facts which commended itself to *Britton, J.*, who delivered the prevailing judgment in the Divisional Court.

Defendant did not, either by his pleadings or at the trial, clearly set up that there had been a conversion of his stock by the manner in which plaintiffs had dealt with it. That contention was really first put forward in the Divisional Court. Had it been distinctly raised at the trial while plaintiffs' witnesses were under examination, it is quite probable that the precise terms under which the stock had been pledged to the bank would have been so fully brought out as to have left no room for the suggestion that plaintiffs were not in a position to control the bank to the extent of having the right

to free the stock from the pledge on payment merely of what was due by him thereon. The fact that plaintiffs were always in a position to hand over the stock without going into the market and buying for that purpose, is expressly deposed to, and, in the absence of any qualification or weakening of the statement by cross-examination, I do not see why the statement should not be accepted.

It was for defendant to prove a conversion by some unauthorized dealing with his stock which would have deprived him of the right or affected his right to redeem it, and this, I think, he has not succeeded in doing. The stock may have been improperly pledged, but plaintiffs say that, notwithstanding this, it remained so far under their own control that they could always have procured its release, had defendant come in to redeem it.

As regards the other questions of fact dealt with at the trial and in the Divisional Court, I am in accord with the findings and dispositions below, and would, therefore, dismiss the appeal.

Plaintiffs' claim for additional interest and commission on the sale of defendant's shares has been properly disallowed. They are entitled to no more than the legal rate of interest, 5 per cent. At all events they have not proved that they are entitled to more than that, and no authority has been cited to shew any right to charge commission upon a sale of defendant's shares made without instructions from him and for their own protection.

The cross-appeal will also be dismissed with costs.

MOSS, C.J.O., GARROW, and MACLAREN, JJ.A., concurred.

STREET, J., died while the case was standing for judgment.

CARTWRIGHT, MASTER.

OCTOBER 2ND, 1906.

CHAMBERS.

COLLIER v. HEINTZ.

Writ of Summons—Order for Service on Defendants Resident out of the Jurisdiction—Service on Agent in Ontario—Substitutional Service—Cause of Action—Rule 162—Carrying on Business in Ontario—Irregularities in Service—Conditional Appearance.

By the indorsement of the writ of summons plaintiff claimed delivery of 20 shares of stock purchased by defendants for plaintiff on 23rd December, 1905, or damages for non-delivery. The statement of claim alleged that defendants were stockbrokers, carrying on business at Peterborough, but having their head office at Buffalo, and repeated in substance the claim as indorsed.

An affidavit of plaintiff stated that he was desirous of commencing action against defendants for delivery of 20 shares of Union Pacific stock and for damages for breach, within the jurisdiction of the High Court of Justice for Ontario, of a contract to deliver the same to him; that defendants had assets within the jurisdiction to the amount of \$200; that he was advised and believed that he had a good cause of action against the defendants, who resided at Buffalo, and were not British subjects, but carried on business at Peterborough by their manager there, one J. H. Barber.

On this the local Master at Peterborough made an order for service of notice of the writ and of the statement of claim on defendants under Rule 162, and for service thereof on Mr. Barber at Peterborough.

Defendants moved to set aside the order, and the service effected thereunder.

Grayson Smith, for defendants.

W. H. Blake, K.C., for plaintiff.

THE MASTER:—The grounds taken in support of the motion were as follows: (1) no cause of action shewn; (2) insufficient material; (3) alleged business not carried on in

Ontario and service on Barber therefore irregular; (4) that copies served on defendants were imperfect. (5) It was asked that defendants might at least enter a conditional appearance.

I have considered the material, and do not see how the order and service can be set aside.

As to (1) and (2), I think that the Rules were complied with, and that a sufficient cause of action is alleged under Rule 162 (e) and (h). As to this latter it is admitted that the defendants have offices in Toronto and Hamilton, so that it may be safely assumed that they have assets of \$200 at least in the province, when they have not ventured to deny this.

As to (3) I think that service could properly have been made on Barber under either Rule 157 or 159, and therefore the order for substitutional service, being within the discretion of the local Master, should not now be interfered with, seeing that this motion is made on behalf of the defendants themselves. I refer to what was said by the Chancellor in *Taylor v. Taylor*, 6 O. L. R. 545, 546, 2 O. W. R. 953, on this point.

(4) The copies were in some respects no doubt defective. But defendants were not in any way prejudiced by these omissions, as the order gave the whole matter correctly, and a full copy of this was served.

(5) It is, however, doubtful whether the delivery was to be made in Peterborough so as to bring the action within Rule 162 (e). Following the decision in *Dominion Canister Co. v. Lamoureux*, 7 O. W. R. 272, 378, and cases cited, I think defendants may enter a conditional appearance, and should do so within 10 days (as well as deliver their statement of defence), if so advised. But, in the view I take of Rule 162 (h), it would not perhaps avail them greatly to do so. Having regard to the defects in the papers served, as well as the other circumstances, the costs of the motion will be in the cause.

I think it allowable to say that in my own practice I always ask to see the writ and statement of claim (where one is to be served) so as to form an opinion of whether a *prima facie* case is shewn. And I would not have hesitated to make the order which was made here.

Whether an order for substitutional service was necessary to allow service on Barber or not, it is not now useful to consider, and I express no opinion on that point.

OCTOBER 2ND, 1906.

DIVISIONAL COURT.

JONES v. NIAGARA NAVIGATION CO.

Carriers—Breach of Contract to Carry Passengers to Point in United States—Act of Congress Requiring Payment of Poll Tax—Payment by Carriers—Collection from Passenger—Unlawful Detention—Damages—Findings of Jury.

Appeal by plaintiff from judgment of senior Judge of County Court of York, after findings of the jury in favour of the plaintiff, dismissing the action, upon the ground that there was no evidence proper to be submitted to the jury. Action for damages for breach of a contract to carry plaintiff from Toronto to Buffalo.

W. T. J. Lee, for plaintiff.

J. Bicknell, K.C., for defendants.

The judgment of the Court (FALCONBRIDGE, C.J., MAGEE, J., MABEE, J.), was delivered by

MABEE, J.:—On 30th June, 1905, defendants sold to plaintiff a ticket from Toronto to Buffalo and return, by the terms of which the plaintiff was entitled to travel by the defendants' line of steamers from Toronto to Lewiston, and from there to Buffalo, via the New York Central and Hudson River Railroad, and to return within 5 days over the same route.

The Senate and House of Representatives of the United States, on 3rd March, 1903, enacted as follows: "There shall be levied, collected, and paid a duty of \$2 for each and every passenger not a citizen of the United States, or of the Dominion of Canada, the Republic of Cuba, or the Republic of Mexico, who shall come by steam, sail, or other vessel from any foreign port to any port within the United States . . . The said duty shall be paid to . . . by the master, agent, owner . . . of every such vessel or transportation line" The section further provides that this duty shall be a debt in favour of the United States against the owner of such vessel, and elaborate provisions are made

for its enforcement by lien upon the vessel; provisions of a penal character are also directed against the master of the ship, the owners, and others, for breach of the provisions of the Act. This Act and various other regulations connected with its enforcement are known to defendants, and the general manager of defendants' line had instructed the pursers of the boats to collect the \$2 from each person who came under the provisions of the Act, and in the event of the passenger declining to pay the tax, such person was to be returned free of charge to the point from which he embarked, if the immigrant officer so demanded. Plaintiff on 30th June proceeded by boat to Lewiston, and he says when about half way across the lake he was interviewed by the United States officer, who questioned him as to his nationality, the length of time he had been in Canada, and the result of the interview was that this officer told plaintiff he was liable to pay the head tax of \$2, and to go to the purser and pay him, that if he (plaintiff) returned to Canada within 48 hours he would get his \$2 refunded. Plaintiff states that upon this understanding he went to the purser, the defendant Schmitendorf, and told him he had come to pay the \$2, and wanted a receipt, and that the purser told him he was not giving receipts. The plaintiff also says he offered the \$2. He afterwards attempted to leave the boat without paying the \$2, and says that, when on the gang plank, the purser and the United States government officer told him he would have to return and pay the \$2 before he could go on; that he then returned to the purser's office and again offered to pay the \$2; that the purser asked to see his ticket, and upon plaintiff giving the ticket to him he kept it, told him he was detained, and would be taken back to Toronto; that he (plaintiff) did his best to get the purser to accept the \$2 and give him a receipt, so that he could get his refund, and let him go about his business. Plaintiff's statement of what occurred did not at all agree with that of the purser or the government officer.

The following are the questions and answers of the jury:—

1. Was plaintiff while on a journey to Buffalo in June last prevented from entering into the United States? Ans. Yes.
2. If so prevented, then state by whom was he so prevented and at what place. Ans. He was prevented by the purser, at

Lewiston, when the purser retained possession of Jones's ticket.

3. Also state on what grounds he was so prevented from entering the United States. Ans. By the refusal of the purser to give Jones a receipt for the \$2 tendered for the head tax by which he would obtain a refund on his return trip.

The jury assessed damages at \$100 in favour of plaintiff.

The trial Judge, notwithstanding the findings of the jury, gave effect to a motion for a nonsuit made by the defendants.

In this I think he was wrong. Much evidence was given as to whether plaintiff fell within the class covered by the United States Act, but I do not regard that as material. Defendants had contracted to carry plaintiff to Lewiston. If plaintiff was within the class of persons covered by the Act, then defendants, and not plaintiff, were liable to pay the \$2. The Act states that this tax shall be paid by the carrier. The United States government officer could not demand the tax from the passenger; it was not his debt; the government looked to the carrier for payment.

Defendants' purser had no right to demand payment of the \$2 from plaintiff, and make its payment a condition of his being allowed to land, nor had he any right to retain possession of plaintiff's ticket, and by so doing broke defendants' contract to carry plaintiff to Lewiston. No hardship results in so holding. Defendants could by a few words printed upon their tickets—upon which there is ample room—have made their contract with plaintiff subject to this payment of \$2, if plaintiff fell within the Act, and have thereby relieved themselves of making the payment, and cast that liability upon plaintiff; but, in the absence of such a provision, defendants were themselves alone liable to pay this head tax, and their interference with plaintiff and their retention of his ticket were improper. The purser was acting under express instructions from defendants' manager, and so the latter are liable for the purser's acts.

I think the appeal must be allowed and judgment entered for plaintiff for the damages assessed by the jury, with costs of action and of the appeal.

CARTWRIGHT, MASTER.

OCTOBER 3RD, 1906.

CHAMBERS.

BAIRD v. McLEAN CO.

*Writ of Summons—Service on Agent of Defendant Company
—Proof of Agency—Notice to Company.*

Motion by a solicitor to set aside service of the writ of summons made upon him in Ontario as supposed agent of defendants, under Rule 195.

A. C. McMaster, for the solicitor.

H. Cassels, K.C., for plaintiff.

THE MASTER:— . . . Plaintiff was the Toronto agent of the defendant company until 5th September last. As such he occupied their office at No. 34, Victoria street.

The defendants were incorporated in Ontario, and their head office is at Toronto, but the main office seems now to be at Winnipeg.

The defendants became dissatisfied with plaintiff, and sent him the following letter of 28th August, 1906:—"Dear Sir:—The bearer (the solicitor-applicant) has full authority to take over from you at once our Toronto office. Be good enough to turn him over the two office keys and all records and papers and property of this company now in the Toronto office."

After some negotiations between plaintiff's solicitor and the solicitor-applicant, it was agreed that plaintiff should give up possession of the office. This was done on 8th September. . . . The solicitor-applicant retained possession, and attended at the office at least twice, and forwarded to Winnipeg such letters as he found there addressed to defendants. On one Fisher's appointment as plaintiff's successor, the keys and possession were given to Fisher; this was on 27th September.

On 15th September plaintiff began this action, claiming \$300 for commissions, and damages for wrongful dismissal. The writ of summons was served on 17th September on the solicitor-applicant as agent for defendants.

The applicant has made affidavit that he acted for defendants only in receiving the keys and locking up the office, and reported this to defendants' president, but that he does not represent defendants in connection with any other business, and never did. He was cross-examined at some length. He was authorized to take ejectment proceedings, if necessary, but no legal measures were necessary. All therefore that the applicant did was not, as it would seem, *qua* solicitor.

The motion was supported by *Murphy v. Phoenix Bridge Co.*, 18 P. R. 495. No doubt, if defendants here had discontinued business in Toronto, that case would have exactly applied. . . .

Here the facts are quite different. Unless there was an interregnum during which no business was being done, the applicant was certainly the agent of defendants. He is so treated by defendants in their letter of 28th August. By that he was clothed with authority to assume possession of defendants' office, and he retained it until Mr. Fisher's appointment, who received the keys and possession from him on defendants' authorization.

In the *Murphy* case, at p. 500, Osler, J.A., said: "The object of the Rule is that the company shall have notice of the writ." In the present case it is clear from the material that the company have had such notice.

Unless there was no agent and no business, the applicant must be considered to have been the agent. The business was, perhaps, to be considered as being in a state of suspended animation between the dismissal of plaintiff and the appointment of Fisher. But in all that period the applicant did what was necessary to preserve the continuity of defendants' matters.

It also appears that the writ has not only come to defendants' notice, but also that defendants have sent to plaintiff's solicitors what defendants admit to be due to plaintiff for commissions claimed by him in the writ. . . .

In view of all the admitted facts, I think the service was good, and should be affirmed, and the motion dismissed with costs. The defendants should appear forthwith. . . .

(Affirmed by FALCONBRIDGE, C.J., in Chambers, 5th October, 1906.)

TEETZEL, J.

OCTOBER 3RD, 1906.

WEEKLY COURT.

RE MUFFITT AND MULVIHILL.

Mortgage—Power of Sale—Notice of Exercising—Omission to Serve on Mortgagor and Wife—Conveyance of Equity of Redemption—Vendor and Purchaser—Objection to Title.

Motion by Charles Muffitt, vendor, for an order under the Vendors and Purchasers Act, declaring that the objection to the title of the vendor to certain lands in the city of Toronto made by the purchaser, on the ground that notice of exercising the power of sale contained in a mortgage drawn in pursuance of the Short Forms Act, should be served on the mortgagor and on his wife, notwithstanding the fact that the mortgagor had parted with his equity of redemption, and his wife released her dower to the purchaser of the equity, did not constitute a valid objection to the title.

W. B. Milliken, for vendor.

M. H. Ludwig, for purchaser.

TEETZEL, J.:— . . . I think the omission to serve notice of exercising the power of sale upon the mortgagor and his wife is no objection to the vendor's title. Both joined in a conveyance of all their interest in the equity of redemption before the mortgagee began proceedings under the power of sale. Irrespective of such conveyance, *Re Martin and Merritt*, 3 O. L. R. 284, decides that the mortgagor's wife need not be notified. That case and *Re Abbott and Medcalf*, 20 O. R. 299, are authorities for the proposition that the question upon whom the notice is to be served is to be determined according to the circumstances existing at the time notice is given. When the notice was given in this case the mortgagor had no interest whatever in the equity of redemption. By the conveyance he conveyed all his estate to the grantee, who then became entitled to all the rights incident to the equity of redemption, including the right of the mortgagor to notice of the mortgagee's intention to exercise his power of sale. To obtain title by foreclosure the

mortgagee would not in this case have been required to make the mortgagor a party: see *Kinnaird v. Trollope*, 39 Ch. D. 636, 642.

Declaration will be that the purchaser's objection is invalid.

MABEE, J.

OCTOBER 4TH, 1906.

TRIAL.

CANADIAN PACIFIC R. W. CO. v. CITY OF TORONTO.

Railway—Protection of Public at Highway Crossings—Gates and Watchmen — Liability of Municipality — Orders of Railway Committee of Privy Council and Board of Railway Commissioners—Acquiescence.

Action to recover from defendants \$4,677.11, being the proportion that it was alleged defendants were liable to pay towards the maintenance of gates, etc., of certain city streets crossed by plaintiffs' line of railway.

Angus MacMurchy, for plaintiffs.

J. S. Fullerton, K.C., for defendants.

MABEE, J.:—The liability arises under orders of the Railway Committee of the Privy Council, dated 8th January, 1891, and 16th December, 1893, both of which were made rules of Court on 28th February, 1895. Plaintiffs provided the gates and watchmen as ordered, and rendered defendants from time to time proper accounts of the expenses connected with their compliance with these orders, and defendants paid their share each year, pursuant to the orders, down to 31st December, 1901, since which date they have paid nothing, although accounts were regularly rendered.

Defendants plead that the streets in question were highways prior to the construction of plaintiffs' line of railway; that the Railway Committee had no authority or jurisdiction to order or direct defendants to pay any portion of the cost of protecting such crossings; and that these orders are not binding upon defendants. It is also pleaded that the clause or clauses of the Railway Act purporting to give the Committee power to make orders such as those in question, are

ultra vires of the Parliament of Canada, and the notices provided for by sec. 60 of the Judicature Act were duly served. In the 6th paragraph of the statement of defence it is alleged that the Bathurst street and Dufferin street crossings are not within the municipality of the city of Toronto, and the Avenue road crossing was not within the municipality of the city of Toronto until 10th March, 1905.

The following admissions were signed by counsel:

1. The line of the Canadian Pacific Railway runs along part of the north limit of the city of Toronto, and at its intersection with Dufferin and Bathurst streets, mentioned in the orders of the Railway Committee in question in this action, the south limit of the railway lands is the north limit of the city of Toronto, and the protection ordered is upon a portion of the highway in the township of York. The intersection of the said line of railway with Avenue road was at the date of the said orders of the Railway Committee, and still is, wholly within the city of Toronto.

2. Dufferin and Bathurst streets and Avenue road run from south to north through the city of Toronto or part thereof, and these continue northwards through the township of York and adjacent townships of the county of York, and are public roads or highways under the jurisdiction of and maintained by the different local municipalities in which the parts thereof respectively lie, that is to say, as to the parts in question here, by the township of York as to the Dufferin and Bathurst streets intersections, and by the city of Toronto as to Avenue road intersection.

3. Dufferin and Bathurst streets are highways laid out by the original Crown survey, and, with Avenue road, were all in existence as highways prior to the construction of the plaintiffs' railway.

4-5. Accounts have been rendered, as stated in the 6th paragraph of the statement of claim, the amount of which is not disputed, and the said accounts are unpaid at this date. Of the said accounts the amount of \$2,135.65 relates to the Avenue road crossing, the amount of \$1,261.65 to the Bathurst street crossing, and the amount of \$1,279.81 to the Dufferin street crossing.

No evidence was given upon the hearing, and by consent a brief was handed in subsequent to the trial shewing vari-

ous applications made to the Railway Committee and to the Board of Railway Commissioners in connection with these orders. The fact that defendants adopted or acquiesced in these orders by making payments for several years, does not expressly appear in the signed admissions, but it was alleged by counsel during argument, and not denied, that defendants had paid all the sums claimed by plaintiffs as payable by them from the date of the orders down to 31st December, 1901. In 1904 the township of York (that municipality being a party to the orders of 8th January, 1891, and 16th December, 1893), made an application to the Board of Railway Commissioners to rescind or vary the foregoing order; all parties concerned appeared, and the matter was argued at great length. This application was, on 16th May, 1906, dismissed, and the order dismissing that application was made a rule of the High Court on 19th May, 1906.

I am of opinion that defendants are concluded by authority upon all the points raised by them as reasons why they should not continue paying under these orders—indeed it was arranged at the hearing that I should delay judgment until the defendants had an opportunity to move in the Privy Council for leave to appeal from the judgment of the Supreme Court in the Grand Trunk case, which motion I am advised was made, but without success. Holding the opinion that the questions in issue have all been resolved against defendants, no good would be accomplished by an expression of my view upon these issues.

The cases governing are: *Terrault v. Grand Trunk R. W. Co.*, 36 S. C. R. 671; *Re Canadian Pacific R. W. Co. and County of York*, 27 O. R. 559, 25 A. R. 65; *Grand Trunk R. W. Co. v. City of Toronto*, 4 O. W. R. 450, 6 O. W. R. 27; *Canadian Pacific R. W. Co. v. Grand Trunk R. W. Co.*, 7 O. W. R. 814.

There must be judgment in favour of plaintiffs for \$4,677.11, together with interest from the date at which the various amounts were due and payable by defendants, with costs of suit.

CARTWRIGHT, MASTER.

OCTOBER 5TH, 1906.

CHAMBERS.

HAMILTON v. HODGE.

Venue—Change—Convenience—Action to Set aside Tax Sale.

Motion by defendants to change the venue from Toronto to Port Arthur in an action to set aside a tax sale of lands in the district of Thunder Bay.

T. D. Delamere, K.C., for defendants.

J. W. Bain, for plaintiff.

THE MASTER:—The plaintiff has been for some time past out of the province, and has not been examined for discovery. His solicitor makes an affidavit that the only evidence that can be given by the defendants (sic) is documentary, and that the case has been on the peremptory list here three times. He does not say anything about his own witnesses, which, if it were necessary to rely on this ground, would seem to bring this case within the decision in *Gardiner v. Beattie*, 6 O. W. R. 975, affirmed on appeal, 7 O. W. R. 136. For the defendants say that it will be necessary for the trial of the action to call a majority at least (if not all) of the officers of the municipality, who are all residents of Thunder Bay; that all the records must be produced, and that some have been burnt at a recent fire, and must be supplemented by oral testimony. This seems to be very reasonable. In the converse case it would not be satisfactory to have an action to set aside a tax sale of land in Toronto tried at Port Arthur, just because the plaintiff was living there. Such cases as the present seem to come within the principle of *McDonald v. Park* (a motion to change the venue from Toronto to Chatham), 2 O. W. R. 812 and 972 (cited with approval in *Saskatchewan Land and Homestead Co. v. Leadley*, 9 O. L. R. 556, 5 O. W. R. 449). In affirming the order to change the venue in that case, Osler, J.A., said that "each case must be judged by its own facts, and that this was eminently a case for trial at Chatham."

In the present case the statement of claim alleges no less than 22 distinct irregularities in the actions and records of

the assessor, clerk, collector, and treasurer, at various dates, of the municipality, and further that "the said sale was not conducted in a fair, open, or proper manner." All this evidence is to be had, if at all, at Port Arthur. It is out of the question that plaintiff should be allowed to bring persons down at an expense of at least \$50 or \$60 each, and then seek to charge this large sum to the defendants if the action succeeds. Two of the defendants live at Port Arthur. The other resides at London, but is willing to have the venue changed.

This seems to me "eminently a case for trial at" Port Arthur, and the order will go with costs in the cause. There should be time enough before the 19th of next month to have the plaintiff examined and the case ready for trial.

MACMAHON, J.

OCTOBER 6TH, 1906.

TRIAL.

HOGABOOM v. HILL.

Husband and Wife—Moneys Borrowed on Insurance Policy on Life of Husband of which Wife is Beneficiary—Separate Property of Wife—Business of Wife—Interest of Husband — Moneys Derived from Business — Execution against Husband as Member of Partnership—Property Liable to Satisfy Execution — Declaratory Judgment—Inquiry—Reference—Costs.

Action by the executors of the will of George R. Hogaboom, deceased, against Byron John Hill, and his wife, Annie Kirkbride Hill, for a declaration that certain real estate and chattels standing in the name of the latter were really the property of the former and liable to satisfy the judgment and execution of plaintiffs against the former, or that he had an interest therein liable to execution, and for consequent relief.

I. F. Hellmuth, K.C., and W. N. Ferguson, for plaintiffs.
G. H. Kilmer, for defendants.

MACMAHON, J.:—In August, 1893, the testator George R. Hogaboom recovered a judgment for . . . \$261 debt

and \$32.59 costs against the firm of Hill & Weir (composed of defendant Byron John Hill and one Weir), then carrying on business in Toronto as printers. An execution against goods was issued on that judgment and returned by the sheriff *nulla bona*. Execution against lands was subsequently issued, which was renewed from time to time as required by law, the last renewal being on 18th July, 1905. . . .

In January, 1894, another judgment was recovered by Hogaboom against Hill & Weir for \$1,490.96 debt and \$25.24 costs. That judgment was set aside during the present year.

The firm of Hill & Weir got into financial difficulties in 1893, and were unable to continue in business.

In 1892 defendant Byron J. Hill was married to Annie Kirkbride (co-defendant) without any marriage settlement. At the time of his marriage he held a policy of insurance on his life in the Ontario Mutual Life Ins. Co., on which he had in January, 1890, borrowed \$950. After his marriage he, by indorsement on the policy, named his wife as beneficiary thereunder. As Hill was not in a position to go into business on his own account, his wife on 17th January, 1894, obtained a loan of \$654.15 from the insurance company on the policy, and with this money commenced a printing business under the name of "The Hill Printing Company," of which her husband was the manager.

Byron J. Hill, just before his marriage, had furnished a house with the usual household furniture, and he and his wife went to live there immediately after their marriage. On 18th January, 1894, Mrs. Hill mortgaged the household furniture to her mother, Elizabeth Kirkbride, to secure payment of a loan of \$300 with interest at 7 per cent., repayable at the expiration of 3 months. Although there was in the house at the time this mortgage was given a piano valued at \$300 belonging to Mrs. Hill—a gift to her by a relative—it is not specifically mentioned in the mortgage.

The \$300 said to have been received from Mrs. Kirkbride was put into the business which Mrs. Hill had started, but the amount does not appear to have been credited in the bank where Mrs. Hill kept her account in the name of the Hill Printing Co., although the \$654.15 received by her from the insurance company was credited therein on 16th February, 1894.

It is, I consider, clear that the \$654.15 borrowed from the insurance company was Mrs. Hill's own money, she being the beneficiary named by the indorsement on the policy. According to the rules of the insurance company, where a beneficiary not named in the policy desires to obtain a loan from the company on the security of the policy, the beneficiary and the insured are required to make a joint application for the loan; and the cheque issued by the insurance company was made payable jointly to Hill and his wife; but, as I have said, the money was her separate property, and was put into the business of the Hill Printing Co.

The \$300 obtained on the chattel mortgage stands, I think, in a totally different position. The furniture belonged to Hill; his wife had no right to mortgage it; and the husband seems to have been a party to obtaining this loan from his mother-in-law for the purpose of putting it into the business, which he says was his wife's. Although it does not appear from the books what became of this \$300, according to the statement of both defendants it went into the business; and, as the property forming the security for the money advanced was Byron J. Hill's property, it must be regarded as having been put into the business by him, and he, therefore, has a proprietary interest in the business. I think his conduct during his management of the business shews that he considered that he had an interest in it, because he paid off several small liabilities of the old partnership of Hill & Weir. If I am correct in the conclusion that he had a proprietary interest in the business, then the house in Lowther avenue, purchased from the Canada Permanent Mortgage Corporation, being paid for by monthly instalments out of the business of the Hill Printing Co., his interest therein must be held liable to satisfy plaintiffs' execution.

Another matter indicating that Mrs. Hill was using her husband's property presumably in connection with the printing business, is shewn in connection with the giving by her of a mortgage on the contents of a livery stable of which he was the owner, the livery business being carried on in Yonge street, in the city of Toronto. On 25th October, 1894, the whole of the livery outfit, consisting (amongst other things) of a cab, a brougham, one coupé, a top carriage, 2 buggies, 5 sleighs, cutters, cabs, 6 horses, fur and other coats, robes, harness, etc., were mortgaged by Mrs. Hill to the Imperial Loan Co. to secure the repayment of \$346.60 with interest

at 7 per cent. . . . Mrs. Hill said her husband had told her of the existence of the livery business, but she did not remember the occasion of giving the mortgage, or what became of the money borrowed from the loan company. Hill was not examined as to the destination of the money.

Counsel for defendants urged that on an execution against the firm of Hill & Weir, a levy could not be made on the goods and chattels of one of the partners to satisfy the firm's debts. Under the Bankruptcy Acts a creditor of a bankrupt firm cannot rank against the separate estate of a member until the member's creditors have been paid in full. But no such condition exists here, and plaintiffs, having an execution against the firm of Hill & Weir, can realize out of the separate estate of any member composing it.

I direct judgment to be entered (1) declaring that defendants Byron John Hill and Annie Kirkbride Hill are respectively interested in the business of the Hill Printing Co. . . . and in the lands and premises on Lowther avenue, in the proportions in which they have respectively contributed to the moneys invested therein; (2) declaring that the share of Byron J. Hill in such properties is liable to satisfy plaintiffs' claim; (3) directing a reference to the Master in Ordinary to ascertain the interest of defendant Byron John Hill in the said business and property, having regard to the declaration aforesaid, and to sell the same, and directing the purchase money to be paid into Court, and all proper parties to join in conveyances, and directing the money paid into Court to be applied in payment of costs of action and then in payment of plaintiffs' claim. . . .; (4) also declaring that the goods and chattels put in the house in Lowther avenue . . . by Byron J. Hill are his property, and that the same (save such part thereof as is by law exempt from execution) are liable to satisfy plaintiffs' claim; (5) directing the Master to ascertain and state what portion of the said goods and chattels is liable to be sold in execution, and directing the same to be sold with the approbation of the said Master, and the proceeds to be paid into Court and applied in payment of plaintiffs' costs of sale, and then in payment of plaintiffs' claim and such part of the costs of the action as may not be recovered from defendants; (6) and ordering defendants to pay costs of action up to and including this judgment.

OCTOBER 6TH, 1906.

DIVISIONAL COURT.

RE GEROW AND TOWNSHIP OF PICKERING.

Municipal Corporations—Local Option By-law — Submission to Electors — Voting by Non-resident Tenants—Majority Procured by Bribery—Treating—Supporter of By-law Acting from Personal Motives—Extent of Treating—Influence upon Majority.

Appeal by the township corporation from order of MEREDITH, C.J., in Weekly Court, quashing by-law No. 871, being a local option by-law, of the township of Pickering, which was approved by the electors by a majority of 205 in a vote of more than 1,200.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, J., CLUTE, J.

J. E. Farewell, K.C., and J. M. Godfrey, for the corporation.

E. E. A. DuVernet, for the applicant Gerow.

FALCONBRIDGE, C.J.:—The original notice of motion sets forth 12 grounds of objection to the by-law. All of these, save one, were technical in their nature, and Meredith, C.J., properly refused to give effect to any of them. He, however, thought that one branch of them was somewhat serious. It was alleged that a large number of tenants who were non-residents, and therefore not entitled to vote, cast their ballots. The evidence, he remarked, was not very satisfactory on this point, and it now appears that there were only 4 persons so disqualified who voted at this election, and we give the township leave to file the certificate of the clerk to this effect.

There remains, therefore, only one ground of objection to be considered in the present appeal, viz.: "10. The majority of the votes for the by-law was procured by bribery, corruption, and undue influence practised on the electors at said

election." It is evident that the draftsman had well in his mind the provisions of sec. 381 of the Consolidated Municipal Act, 1903, "Any by-law the passage of which has been procured through or by means of any violation of the provisions of sections 245 and 246 of this Act, shall be liable to be quashed. . . ."

. . . . The Court must be satisfied that the violation of the sections referred to was the means of the passing of the by-law.

The particular offence charged is that of treating, which is not specifically mentioned in sec. 245 or 246. Meredith, C.J., has, however, manifestly regarded treating as a form of bribery or undue influence, and therefore within the mischief aimed at by the statute.

The person whose alleged lawless acts have caused the trouble is one W. E. Vanstone, and there is no pretence that he was an agent of those who were supporting or promoting the passage of the by-law in question, which is a local option by-law. Vanstone is neither in principle nor in practice what is known as a "temperance man" (i.e., total abstainer as distinguished from a temperate man). On the contrary, in the pursuit of his ordinary business, which is that of a drover, he spends money "a little all the time" in drinks and treating. His custom is, "we" (he and "the boys") "generally have a drink when we can get any place handy." He admits that the temperance party probably looked at him askance as being a "whisky man." He does not claim to have supported the by-law on account of any principle involved, nor from any desire to suppress the traffic in liquor, but in order to "get even" with a local publican who had ordered him out of his hotel, and Vanstone accordingly tried to "put him out of business."

Thus is presented a very complete paradox. A temperance by-law is in question. This supporter is not a temperance man. And it is charged that he procured the passage of the by-law by corrupt methods, which are not supposed to be those of temperance people.

The whole case is in Vanstone's evidence. He is manifestly quite willing to pose as one who "went out to win" the election, and won. But he does not prove any condition of general drunkenness throughout the township so as

to produce obvious demoralization to an extent which might influence the election: The Tamworth Case, 1 O'M. & H. 85. On the contrary, there is no evidence of the treating of one elector, and no evidence of any intoxication.

The order appealed from must be set aside with costs here and below.

BRITTON, J., gave written reasons for the same conclusion, referring to The Bradford Case, 1 O'M. & H. at pp. 39, 40, 41; The Drogheda Case, ib. at p. 259.

CLUTE, J. also concurred.

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HODGINS, MASTER IN ORDINARY.

MAY 4TH, 1906.

MASTER'S OFFICE.

CAMERON v. PETERS.

Partnership—Dissolution—Reference to Take Accounts—Partnership Articles—Covenant for Payment of Specified Sum—Lien for—Report of Master—Special Circumstance.

Reference to the Master in Ordinary in a partnership action.

S. Alfred Jones, for plaintiff.

W. B. Laidlaw, for defendant.

THE MASTER:—By partnership articles dated 17th February, 1904, plaintiff and defendant entered into a co-partnership in the trade or business of manufacturers of shoe and leather dressing and other specialties, under the name, style, and firm of "The Maple Leaf Brand Shoe and Leather Dressing Company," for the term of 3 years from the said date, at No. 617 Queen street west, in the city of Toronto.

By a notice in writing dated 1st February, 1906, defendant served notice on plaintiff that the partnership should cease at the expiration of 15 days from that date. And by judgment dated 12th February of the same year the partnership was declared to be dissolved, and Mr. E. R. C. Clarkson was appointed receiver, and the usual partnership accounts were directed to be taken.

Clause 2 of the partnership articles was as follows: "2. That the said co-partners shall each contribute towards the capital stock of the co-partnership, as follows: the said

Michael Peters shall furnish all necessary capital for the carrying on of the said business until the same becomes a paying concern, and shall pay to the said Donald Cameron \$900 in cash on the execution of this indenture; and the said Donald Cameron, in consideration thereof, shall teach and instruct the said Michael Peters, to the best of his ability and at all times during working hours, in the manufacture of the said shoe and leather dressing, and generally in the said trade and business."

This provision brings this co-partnership under the class of partnerships where one partner contributes all the capital necessary for the business, and the other contributes his labour and skill. And on a dissolution of such a partnership the partner who has contributed the money or property which has formed the capital of the firm, is entitled, after payment of the debts of the co-partnership, and an adjustment of the accounts of the partners inter se, to be repaid the amount of money or value of the property he has contributed to such capital. And he is entitled to this re-payment before any division of profits. The partner who has contributed his labour or skill can only claim as his compensation a share in the profits which the co-partnership has earned during the term of the partnership.

Another clause in the said co-partnership articles is as follows: "3. That all losses and expenses of the said co-partnership shall be borne and paid equally by the said co-partners."

This clause must be construed as subject to the terms of the preceding clause, which provides that the defendant is to "furnish all necessary capital for the carrying on of the said business until the same becomes a paying concern." But until the liabilities—"losses and expenses"—of the said co-partnership are ascertained, and the assets are realized, it may not be necessary to construe or apply this clause further. But in order that the co-partnership assets shall be properly administered a notice to creditors must issue in the ordinary form.

But on the covenant by the defendant that he "shall pay to the said Donald Cameron \$900 in cash on the execution of this indenture, and the said Donald Cameron in consideration thereof shall teach and instruct the said Michael Peters, to the best of his ability and at all times during working hours, in the manufacture of the shoe and leather

dressings, and generally in the said trade and business," I find on the evidence that Donald Cameron did teach and instruct Michael Peters as required by the clause, and that Donald Cameron is therefore entitled to be paid by Michael Peters \$900, with interest at 5 per cent. from 17th February, 1904.

And as by Con. Rule 667 the Master is authorized under any judgment "in taking accounts, to inquire, adjudge, and report as to all matters relating thereto as fully as if the same had been specially referred," and as by sub-sec. 12 of sec. 57 of the Judicature Act it is required that in every cause or matter pending before the Court the Court shall grant, either absolutely or on such reasonable terms and conditions as shall seem just, all such remedies whatsoever as any of the parties may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward in such cause or matter, so that as far as possible all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any such matters avoided, it will be proper to report, as a special circumstance, that the plaintiff being entitled to recover the said sum of \$900 from defendant under the covenant in the said partnership articles, should be declared to have a charge or lien on any moneys to which defendant may be entitled on the adjustment of the accounts of this partnership.

See *Elgie v. Webster*, 5 M. & W. 518, and *Lindley on Partnership*, pp. 595-6.

SCOTT, LOCAL MASTER.

APRIL 9TH AND
OCTOBER 8TH, 1906.

MASTER'S OFFICE.

E. B. EDDY CO. v. RIDEAU LUMBER CO.

Contract—Lumbering Operations—Cleaning out Stream—Allowance for—Proportion of Cost—Driving Timber—Breach of Contract—Construction of Contract—Impossibility of Performance—Failure to Get Logs out—Measure of Damages—Destruction of Logs by Fire—Negligence—Nominal Damages—Interest—Costs—Claim and Counterclaim.

This is an action referred to the local Master at Ottawa for trial, involving disputes arising out of lumbering opera-

tions carried on by the parties on some of the streams tributary to Lake Temiskaming. The matters at issue fell under three heads: one forming the subject of the disputed portion of the claim, and the other two of the counterclaim. A portion of the claim was not disputed.

J. F. Orde, Ottawa, and M. G. Powell, Ottawa, for plaintiffs.

G. F. Henderson, Ottawa, for defendants.

THE LOCAL MASTER:—In the autumn of 1903 a verbal agreement was entered into between the local agents of plaintiffs and defendants, and of Mr. J. R. Booth, whereby plaintiffs and Booth were to clean out one-half each of a stream known as the Jean Baptiste creek, charging up a proportionate part of the cost to defendants. The Jean Baptiste creek was entirely in a state of nature, no lumbering operations having theretofore been carried on upon it. The evidence is that in such a case a great deal of preliminary work in the way of cleaning out brush and fallen trees, cutting away over-hanging limbs, etc., is necessary before driving operations can be successfully carried on. It was this class of work that the agreement contemplated. A portion of it was done in the autumn, and as to the charge for that no dispute arises. The cold weather, however, came on before the work was completed, and the remainder of it was done in the spring. For the cost of this latter portion defendants dispute their liability. I find on the evidence that, while doubtless all parties assumed that the work would all be done in the autumn, the agreement was in no way contingent on that. I find further that a large part of the work done by plaintiffs in the spring was primary cleaning out, such as defendants had agreed to share the cost of. This must be evident from the undisputed fact that over a considerable portion of the creek no work whatever was done in the autumn. The evidence is that even in the case of streams that have previously been driven, a certain amount of cleaning out is necessary each spring, and for this class of work defendants are not, of course, liable. The evidence is, however, that allowance, and I think I must find sufficient allowance, has been made for this by plaintiffs in arriving at the amount claimed. I therefore allow plaintiffs' claim at \$706.04, the full amount claimed.

Under another verbal agreement defendants drove certain timber of the plaintiffs' down a stream know as Hudson creek. Both the measure of the remuneration payable and the quantity of the timber driven were disputed, but, in view of the opinion I expressed on the argument, counsel consented to my fixing the amount due defendants under this head at \$214.20.

The most serious dispute of all, and one without which the other two would probably never have gone to suit, arises under a contract in writing, dated 18th March, 1904. Under the terms of this defendants undertook to "drive, sweep, and boom out at the mouth of the Wabis creek" certain timber of plaintiffs on that creek, plaintiffs, in consideration thereof, undertaking "to drive and sweep all the logs and timber, the property of the said Rideau Lumber Company Limited, placed in or on the banks of the Jean Baptiste river and Blanche river, from its junction therewith to the mouth of the said Blanche or White river, and there deliver the same to the Upper Ottawa Improvement Company, Limited."

The two following clauses occur in the agreement:—

"3. It is further agreed by and between the said companies that all timber or logs on the banks of the said rivers or creeks, to be driven as aforesaid, and which is not dumped into the waters of said rivers and creeks, when required so to be for that purpose, shall be dumped by that company hereby required to drive same, and a proper statement, shewing what logs and timber, if any, were so dumped, furnished forthwith to the company owning same, and such last mentioned company shall be liable for the usual sum paid for dumping logs and timber similarly situated, and pay to the company dumping same said sum or sums, if any, on demand.

"5. And it is further agreed that each of the said companies, their successors and assigns, shall make every reasonable effort under the circumstances to fulfil their respective parts of this agreement, during the driving season of this year, and if at any time either company fail to do so, the other company may give notice thereof in writing to such company offending, and in case such demand is reasonable and not complied with by a time to be specified for that purpose by the company giving notice, such last mentioned company may perform such services itself, at the expense and cost of the company so in default."

The agents who acted in the matter for the respective parties agree in saying that clause 5 was inserted by the solicitor who prepared the agreement without specific instructions from them, and that, owing to the extreme shortness of the driving season, the portion of it relating to notice of default, etc., was altogether unworkable.

Defendants completed their part of the contract, and as to that nothing arises. Plaintiffs admittedly left a large proportion of defendants' logs on the shores of the Jean Baptiste and the Blanche. It is said that it was not reasonably possible to get these logs down, and that plaintiffs, under clause 5 of the agreement, and even apart from it, are thereby excused. In the view I take, it is unnecessary to consider whether or not the kind of impossibility sought to be set up would excuse plaintiffs. I find on the evidence that plaintiffs' agents did not make proper effort to get the logs out, and it must therefore be presumed that, had they done so, they would have succeeded in bringing down all the logs. The evidence is too voluminous to permit of its being referred to in detail. I may, however, mention two or three points. Notwithstanding clause 3 of the contract, practically no attempt was made by plaintiffs' men to dump or assist in dumping defendants' logs on the banks of the Jean Baptiste. The foreman did not even know that such a duty was cast on him. It is said that what was known as the McNaughton dump was in very bad shape for handling, but plaintiffs' men did not even try. Again, the plaintiffs' agent was not justified in closing operations on the Jean Baptiste on 16th May, and discharging those of his men not required for the sweeping of the Blanche. He should have waited (as defendants' agent did on the Wabis) for the rain that was almost sure to come, and that did in fact come a few days later. Then, as regards the sweep of the Blanche, it was not impossible, but at the most only difficult, to roll the remaining logs into the water after the jam had been cleared away. There was plenty of water in the river all summer, and if the banks were too muddy to work on to advantage immediately after the water fell, the men could have been sent back to do the work later in the season. The plaintiffs are therefore liable for the damages occasioned by the failure to get the remainder of the logs out, and the only remaining question is as to the measure of damages. As regards the timber other than that in the McNaughton and the Stall-

wood & Gunn dumps, this presents no serious difficulty. It was all brought out by defendants in the following season, and the claim made is for the cost of bringing it out, together with interest on the cost of the stuff for the year during which delivery was delayed, and both of these defendants are certainly entitled to recover. As regards the McNaughton and the Stallwood & Gunn timber, however, the matter is further complicated, by the fact that both dumps were, in the interval, destroyed by fire. The Stallwood & Gunn dump was destroyed by a purely accidental forest fire soon after the close of the driving season. Learning of this, defendants' agent, in order to protect the McNaughton dump from a similar mishap, gave instructions to have the brush burnt away from around it, as it is customary for lumbermen to do in the case of their shanties, in order to protect them from forest fires. The pile, however, took fire from the burning brush and was destroyed. It is in evidence that had it not been destroyed in this way it would not have been destroyed at all, as no forest fire occurred in that vicinity during the year. In the view I take, it is unnecessary to consider whether or not the burning of the McNaughton logs was due to the negligence of defendants' employees. It appears to me clear that the accidental destruction of the timber by fire was not a result flowing so naturally from the plaintiffs' breach of covenant as to entitle defendants to the value of the timber by way of damages. There was evidence, it is true, to the effect that forest fires are of common occurrence in that country, and that the danger from them is a constant menace to shanties and to timber left behind in the spring. Still I think that is hardly enough to render plaintiffs liable in the way contended for. In the words of Armour, C.J., in *Leggo v. Welland Vale Co.*, 2 O. L. R. 49, it was not a damage such as might fairly and reasonably be considered as either arising naturally according to the usual course of things from the breach of such a contract, or such as might reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. I quite recognize that the present is a much stronger case for allowing the damages than was *Leggo v. Welland Vale Co.* Still I think that, even here, the damages are too remote. The most that can be said is that the destruction of the timber by fire was a not unlikely possibility, and that I think is not enough. To what damages

then are defendants entitled? As the McNaughton and Stallwood & Gunn timber was never in fact brought down at all, the same measure obviously cannot be applied as in the case of the other logs. It does not appear to me that defendants are entitled to any more than nominal damages. The loss of the timber by fire is the only damage defendants have suffered. If plaintiffs are not liable to make that good, there cannot be any question of substantial damages at all. This result may appear unfortunate in view of plaintiffs' breach of contract, but it is, I think, inevitable.

As arranged on the argument, I will hear counsel further as to the quantity of timber left behind by plaintiffs and brought down by defendants the following year, and as to the cost to defendants of bringing it down.

Argument was afterwards heard as to the amount of damages and on the question of costs.

THE LOCAL MASTER:—After hearing further argument, I find that 6,500 logs were left behind in 1904 on the Jean Baptiste and the Blanche, by plaintiffs, and brought down the following year by defendants. This is exclusive of the McNaughton and the Stallwood & Gunn dumps destroyed by fire, the quantities in which, as only nominal damages can be recovered in respect of them, it is unnecessary to find. The total number of logs brought down by defendants in 1905, including those in question, was 31,667, and the total cost of bringing them down was \$1,000. If defendants are entitled to a proportionate part of this sum as the cost of bringing down the 6,500 logs, the amount will be \$291.37. Plaintiffs, however, point out that defendants would have brought down the other logs in any event, and contend that the cost of doing so could not have been materially increased by the addition of 6,500. It is of course, my duty, in assessing the damages, to endeavour to place defendants in the position they would have been in had the contract not been broken, but in no better position; and if it clearly appeared that the logs were brought down without expense, nothing would be allowable under this head. In the absence, however, of clear evidence of this, I cannot aid the wrongdoer by assuming it to have been so. It is definitely proved that defendants brought down 31,667 logs, at a total cost of \$1,000. The only course open to me appears to be to attri-

bute to the logs in question a proportionate part of that sum. To fix on any other amount would be a pure assumption.

Defendants are also entitled to interest on the value of the logs for the year during which, owing to plaintiffs' default, they were deprived of the use of them. I think, on the evidence, this must be calculated, not at the legal rate, but at 6 per cent. It was the custom of defendants to carry on operations with money borrowed from the bank at that rate, and to credit receipts from sales on the loan. This was done in the year in question, and the actual loss amounted therefore to 6 per cent. The amount is \$225. This leaves a net balance of \$24.53 due defendants, made up as follows,—

Amounts recovered by defendants:

On Hudson Creek contract	\$214 20
On Jean Baptiste and Blanche contract:	
Cost of bringing logs down.....	\$291 37
Interest	225 00
Burnt logs, nominal damages.....	516 37
	<hr/>
	730 57

Amount recovered by plaintiffs 706 04

Balance due defendants\$ 24 53

It only remains to dispose of the question of costs. Plaintiffs have succeeded to the full extent of their claim, but of the \$706.04 recovered, only \$292.67 was ever seriously disputed. Defendants have succeeded on every item of the counterclaim, though the amount recovered is, in each case, considerably less than the amount claimed. In the case of the largest item, only nominal damages have been allowed. I think plaintiffs are entitled to the general costs of the action, and defendants to the costs of the counterclaim. It is true that the chief contest was on the counterclaim. Still, plaintiffs were fully entitled to sue for the claim, as it was due and unpaid. Defendants might have paid the amount into Court and brought an independent action on the counterclaim. I think, however, that the justice of the case can be fully met on taxation by duly considering, in fixing counsel fees, etc., the relative importance of the several issues.

TEETZEL, J.

OCTOBER 8TH, 1906.

CHAMBERS.

FLEMING v. McCUTCHEON.

*Arrest—Intent to Quit Ontario—Intent to Defraud Creditors
—Evidence—Discharge from Custody.*

Defendant was arrested under an order for arrest made by MACMAHON, J., on material which established a prima facie case that defendant was about to quit Ontario with intent to defraud plaintiff, within the terms of sec. 1 of R. S. O. 1897 ch. 80. Upon his arrest he was released on bail in terms of the order.

He now moved to set aside the order, and in the alternative for his discharge under Rule 1047, upon new material filed by him.

R. McKay, for defendants.

L. F. Heyd, K.C., for plaintiff.

TEETZEL, J.:—Even if I thought the original material insufficient, I could not, as I understand the practice, set aside the order, as that could only be done on appeal to a Divisional Court.

The law now appears to be well settled that to justify defendant's detention in custody, there must be not only the intention to quit Ontario, but also the intention thereby to defraud his creditors in general or plaintiff in particular, and that these are questions of fact in each case to be inferred from the facts and circumstances shewn by the affidavits. See *Phair v. Phair*, 19 P. R. 67; *Beam v. Beatty*, 2 O. L. R. 362.

Upon the motion for discharge defendant must shew such facts and circumstances as, in the opinion of the Judge, outweigh the prima facie case made by plaintiff and which negative an intent to defraud.

After a perusal of all the material filed, I am of the opinion that defendant in this case has established that his departure from Ontario was not with the intention of defrauding his creditors in general or plaintiff in particular, but that his purpose was honestly to better his position by establishing himself in the business of a druggist in the province of Saskatchewan.

Some of the facts which I find and which influence my conclusion are: (1) the sale of his business in Ontario was open and well known in his neighbourhood, and it was a profitable sale; (2) long before plaintiff's cause of action arose, defendant had seriously contemplated selling out and moving to Saskatchewan; (3) plaintiff's action is for breach of promise of marriage; her damages, if any, are uncertain, and defendant is, I believe, in good faith defending the action, believing plaintiff has no right to recover; (4) defendant has made provision out of the sale proceeds to pay all his business creditors; (5) he had arranged and intended to return to Ontario about the end of September or beginning of October to settle up a number of business affairs, pack and ship his furniture, and attend the trial of this action.

The order will, therefore, be directing defendant's discharge and a release of his bail. The costs to be costs in the cause unless otherwise ordered by the trial Judge.

ANGLIN, J.

OCTOBER 8TH, 1906.

TRIAL.

KEEWATIN POWER CO. v. TOWN OF KENORA.

HUDSON'S BAY CO. v. TOWN OF KENORA.

Water and Watercourses—Expropriation of Lands of Riparian Owners—Development of Water Power by Municipality—Lease from Crown of Bed of Watercourse—Compensation to Owners—Basis of—Value of Lands—Interest of Riparian Owners in Bed of Stream and Water Power—Parties—Attorney-General—Non-navigable Stream Lying between and Connecting Navigable Waters—Impediments to Navigation by Falls—Title to Lands—Crown Patent—Construction—Ownership ad Medium Filum—English Rules as to Non-tidal Waters—Application to Ontario—Injury to Dam—Compensation for—Costs.

Actions to restrain the municipal corporation of the town of Kenora from prosecuting expropriation proceedings instituted for the purpose of acquiring certain lands situate on

both banks of a watercourse adjacent to the town, and generally known as the east branch of the Winnipeg river. The lands on the eastern bank (mainland) were the property of the Hudson's Bay Co., and those on the western bank (Tunnel Island) were owned by the Keewatin Power Co. The plaintiffs also asked declarations of certain rights which they asserted in the bed of the watercourse and in the water power which might be developed from it, and sought to prevent defendants from carrying on works designed for the development of such water power.

W. Nesbitt, K.C., and J. Jennings, for plaintiffs the Keewatin Power Co.

F. H. Phippen, K.C., and C. A. Moss, for plaintiffs the Hudson's Bay Co.

N. W. Rowell, K.C., G. Wilkie, and A. McLennan, Kenora, for defendants.

W. H. Hearst, Sault Ste. Marie, for the Attorney-General for Ontario.

ANGLIN, J.:—In 1892 the Hudson's Bay Co. leased part of their lands on the eastern bank for a term of 10 years to Messrs. McCrosson and Rideout for the purpose of establishing electric light and power works. The lessees took possession of these lands and constructed works on a small scale, using for their purposes a portion of the waters of the watercourse in question. In 1894 the term of this lease was extended to 20 years, subject to a provision for cancellation upon notice. This lease was at a later date transferred to the Citizens Telephone and Electric Power Co. of Rat Portage, which made a further development of the water power, and supplied the town of Rat Portage and its citizens with electric light, etc. By provincial statute 2 Edw. VII. ch. 62, defendants were authorized to acquire, and they subsequently purchased and took over, the water plant and works of the Citizens Telephone and Electric Co. Plaintiffs the Hudson's Bay Co. had meantime given a notice of cancellation to the Citizens Co., under which they allege that all rights under the lease above mentioned expired on 29th March, 1902. Defendants, however, took possession of the lands covered by the lease, and of the plant and works, under their assignment from the Citizens Co. They then conducted negotiations with the Hudson's Bay Co. for the

purchase from them of the lands theretofore leased to Messrs. McCrosson and Rideout. These negotiations proved unsuccessful, because of the differences between the parties which it is the purpose of these actions to determine, and in 1903 defendants procured from the legislature authority for the expropriation of such lands on both sides of the watercourse as should be required for the power development which they contemplated making. In 1905 defendants obtained from the Crown, as represented by the government of the province of Ontario, what purports to be a lease of the bed of the watercourse in question. They then proceeded with blasting and other works for the development of power in this watercourse, having first given notices of expropriation of the lands upon the banks under their statutory powers. Arbitrators were duly appointed, etc. An order made by the District Court Judge requiring plaintiffs, upon payment into Court of a comparatively trifling sum, to deliver to defendants immediate possession of the lands for the expropriation of which notices had been given, precipitated the present actions.

In the course of the trial before me, by arrangement between the parties, made with my approval, all objections by plaintiffs to the sufficiency and regularity of the expropriation proceedings of defendants were waived; the claim for injunction was withdrawn; the lands described in the expropriation notices given by defendants were conceded to be requisite for their purposes; and it was agreed "that issues should be tried to settle the rights of the parties and obtain directions to arbitrators as to what basis damages by way of compensation are to be assessed on, whether as owners of ~~land~~ of river in addition to land, or as owners of land only, in such case to define rights to be taken into consideration by arbitrators." Certain other minor difficulties were also adjusted.

As a result of this very sensible arrangement, the development works of defendants at Kenora are proceeding. The Court is now asked to determine for what plaintiffs are entitled to claim compensation—whether (a) merely for the value of the lands on the respective banks of the watercourse which defendants purpose taking from them; or (b) also for the value of the adjacent bed and the water power which may be developed from the watercourse lying between the lands of the Hudson's Bay Co. and those of the Kee-

watin Power Co.; or (c) for the value of the lands upon the banks, coupled with such rights in the waters flowing past them as plaintiffs are entitled to as riparian owners.

At the opening of the trial counsel for defendants directed attention to the fact that the title of the Crown to the bed of the river, and to the water power in question, asserted by the lease to defendants, is denied by defendants, and asked that the Attorney-General for Ontario be added as a party defendant in each action. Counsel for plaintiffs opposed that motion. Upon being asked if he would assent to this being done, Mr. Hearst, who appeared for the Attorney-General, requested an opportunity to obtain specific instructions. He subsequently stated that the Attorney-General declined to consent to be made a party, and I thereupon refused Mr. Rowell's motion. (See *Eddy v. Booth*, 7 O. W. R. 75.) Mr. Hearst continued, however, to watch the proceedings on behalf of the Attorney-General.

Much evidence at the trial and not a little strenuous argument was directed to the question whether the water-course with which we are dealing should be deemed part of the Winnipeg river, and should be regarded as part of a stretch of navigable water, or should be held to be a non-navigable stream, connecting two considerable lake-like expanses of navigable water, neither of which forms part of a river. Upon this branch of the case I have had the advantage not merely of the oral testimony adduced, but also of the view which, at the request of all parties, I took of the waters immediately in question and waters adjacent thereto. Upon this inspection of the river my conclusions as to the character of the waters at the point in dispute are largely based.

The town of Kenora is situated at the northern end of the Lake of the Woods. This large and important body of water, studded with countless islands, extends some 80 miles southerly from Kenora to the mouth of the Rainy river, which flows into it, and which forms part of the international boundary between Canada and the United States of America. Its width varies. In some places it is many miles wide, its area being about 2,000 square miles. It is said by some witnesses that formerly there were several natural exits for the waters of this lake. To-day there are but two, known as the east and west branches of the Winnipeg river, and, upon the evidence, I find that there never

was any other natural outlet. These two outlets—the western carrying about 3 or 4 times as much water as the eastern—are three-quarters of a mile apart, being separated by Tunnel Island.

The western branch is several hundred feet wide, and is crossed by a costly and apparently effective regulating power dam constructed by the Keewatin Power Co. The eastern branch, about 60 feet wide, carries a considerable volume of water, which for a short distance rushes down what may be described as almost a gorge, having at one point an abrupt fall of some 15 feet. The length of this “branch” is about 8,000 feet measured from the waggon bridge to the north end of Old Fort Island. The total fall, some 18 feet, occurs in a distance of a few hundred feet. Above and below the falls this branch is itself navigable. Upon the whole evidence I find that the minimum volume of water flowing through this east branch is and always has been capable of producing in the natural condition of the stream, upon development, at least 4,000 horse power. Below the point at which the waters of the eastern and western branches or outlets meet, there is another lake-like expanse of waters, varying in width, containing many islands, and with very little, if any, defined current. Though much smaller than the Lake of the Woods, this body of water is not at all dissimilar in character.

For many years geographers appear to have treated the Winnipeg river as beginning at the head of the two outlets from the Lake of the Woods. All the maps and documents produced, many of them of a public character, refer to the outlets of the lakes as branches of the river. The proper finding upon all the evidence is, in my opinion, that the Winnipeg river commences at the points of outlet from the Lake of the Woods, and that the expanse below the falls of the east and west branches, and those branches themselves as well, form part of that river.

Of the non-navigability of both branches, for a short distance in each, there cannot be any question whatever. The waters below, as well as above, are, however, in my opinion, unquestionably navigable. They afford a route for carriage by water of considerable commercial importance, extending in an otherwise unbroken stretch for some 114 miles. The traffic upon the Lake of the Woods has been for many years past and is still considerable. It is navigable for fairly

large steamboats for a distance of 80 miles south of Kenora. North of Kenora, after the falls and rapids in the east and west branches are passed, the Winnipeg river broadens out and is navigable for at least 34 miles by small steamboats, some 3 or 4 of which ply up and down, carrying freight and a few passengers. At a point 7 miles north of Kenora the first rapids occur. They are not sufficient to interrupt navigation. From a point 34 miles north of Kenora the navigation of the river becomes more difficult, numerous portages being necessary before Lake Winnipeg, 163 miles distant from Kenora, is reached. But in this distance there are several stretches of good water about 20 miles in length capable of carrying boats drawing 5 or 6 feet. This river for many years served as part of the trade route for the Hudson's Bay carriers from the east to Fort Garry and other points. York boats, with a capacity of 20 tons, were navigated up and down it. The volume of water flowing down the river is at all points such that, if natural obstacles were overcome by canals or other artificial means, a route for navigation from Lake Winnipeg to Fort Francis would be quite feasible. Even in its present condition its value as a trade route is not inconsiderable, though since the advent of railways it is no longer travelled as it was in by-gone days. Yet from Fort Francis 80 miles down the Lake of the Woods to Kenora and from Kenora northwards to the crossing of the transcontinental railway—25 to 30 miles farther—Mr. Henry Ruttan, a witness for plaintiffs, upon whose testimony I feel that I may rely, says the waterway is of very great value, adding that the natural impediment to navigation presented by the falls in the east branch of the river can be easily overcome by means of a canal. . . .

[Quotations shewing what is a navigable river, from *Regina v. Meyers*, 3 C. P. at pp. 349, 350, 351, 352; *Essen v. McMaster*, 1 Kerr 501; *Rowe v. Titus*, 1 Allen 329; *McLaren v. Caldwell*, 6 A. R. at p. 489; *Wadsworth v. Smith*, 11 Me. 280; *The Montello*, 20 Wallace 430; *United States v. Rio Grande*, 174 U. S. R. 690; *Broadnax v. Baker*, 94 N. C. 675; *Farnham on Waters*, pp. 125, 127.]

Applying these definitions of navigability, I have little hesitation in holding that the Winnipeg river, said to carry a volume of water little inferior to that of the Ottawa, formerly a great channel of commerce and still of considerable value as a trade route, must be deemed a navigable river.

There can be no question whatever of the navigation in fact at the present time of the waters of this river for 34 miles below the falls of the east branch at Kenora, and of the waters of the Lake of the Woods for 80 miles above Kenora. This east branch, whether regarded as part of the Winnipeg river, as I think it should be, or as a distinct stream, is unquestionably a link in a great stretch of navigable waters of considerable commercial value and importance, in the course of which occurs, in a distance of 114 miles, but one natural impediment to navigation. Such is the character of the watercourse in which it becomes necessary to determine the extent of the rights of riparian proprietors, which plaintiffs certainly are.

The Keewatin Power Company, Limited, are, by grant from the government of Ontario, dated 30th April, 1894, owners of the whole of Tunnel Island, excepting only the right of way of the Canadian Pacific Railway Company across the island.

The Hudson's Bay Company claim to have had title, under grant and charter of His late Majesty King Charles II., to a vast territory lying north and west of the great lakes, which included the lands in question. By deed of surrender, executed in November, 1869, the Hudson's Bay Company relinquished to the Crown all their rights of government over this great territory and title to all the lands comprised in it, excepting certain reserved strips or blocks occupied by and in proximity to their established trading posts, the lands so retained to be selected and to amount in all to 50,000 acres. Upon the eastern bank of the east branch of the Winnipeg river the company at first stipulated for a reservation of 50 acres. But, the lands selected at their various posts being somewhat less than the 50,000 acres agreed upon, in 1872, under an order in council of the government of the Dominion of Canada, to which the British government had transferred the lands relinquished by the company, the company were allowed to select "additional tracts of land" to complete the area of 50,000 acres for which they had stipulated. They then asked for and obtained the right to retain a block of 690 acres at Rat Portage. These lands were surveyed and laid out by Charles F. Miles, P.L.S., under instructions from the Minister of the Interior. They border on the Lake of the Woods and the east branch of the Winni-

peg river. In 1887 the government of the province of Ontario, at the request of the Dominion authorities, issued a patent to the Hudson's Bay Company for this tract of 690 acres, laid out by Miles. The Hudson's Bay Company assert that this patent was merely confirmatory of a title which they had from the time of the grant of Charles II., and retained by virtue of their reservation of 50,000 acres from the surrender to the Crown in 1869. This defendants do not admit, claiming that the Hudson's Bay Company's title rests solely upon the patent of 1887 from the government of Ontario.

The deed of surrender from the Hudson's Bay Company to the Crown excepts the reserved lands in these terms:—

"2. The company to retain all the posts or stations actually possessed and occupied by them or their officers or agents, whether in Rupert's Land or any other part of British North America, and may within 12 months after the acceptance of the said surrender select a block of land, adjoining each of their posts or stations, or within any part of British North America, not comprised in Canada and British Columbia, in conformity, except as regards the Red River Territory, with a list made out by the company, and communicated to the Canadian Ministers, being the list in the annexed schedule. The actual survey is to be proceeded with with all convenient speed."

"4. So far as the configuration of the country admits, the blocks shall front the river or road by which means of access are provided, and shall be approximately in the shape of parallelograms, and of which the frontage shall not be more than half the depth."

At Rat Portage the company's reservation, according to the schedule annexed to the deed of surrender, was restricted to 50 acres. What portion of the 690 acres eventually granted these 50 acres comprise, it is impossible to say. The increase in the area allotted to the company at Rat Portage is explained by a report of the Deputy Minister of the Interior to have been "the result of subsequent arrangement between the company and the government." The order in council of the Ontario government shews that the patent for the 690 acres was issued on the recommendation of the Minister of Crown Lands, stating that "it is proper that the agreement entered into by the government of Canada with the Hudson's Bay Company in the years 1870 and 1872 should be carried out in good faith."

The Ontario patent issued to and accepted by the Hudson's Bay Company grants to them "a parcel or tract of land . . . containing by admeasurement 690 acres, be the same more or less, being composed of a block of land as shewn by a plan of survey by Provincial Land Surveyor Charles F. Miles, dated 7th January, 1875. . . ." This plan shews the plot of 690 acres to extend to the water's edge of the Lake of the Woods and of the east branch of the Winnipeg river.

Applying the ordinary canons of construction, the position of the Hudson's Bay Company should be rather better under the patent from the Ontario government, than under the earlier title which the company asserts, since a reservation in their deed of surrender would be restricted to that which it expresses, rather than extended to include incidental rights not in terms reserved: *Bullen v. Dunning*, 5 B. & C. 849, 850. These plaintiffs are, of course, entitled to the full benefit of the patent from the government of this province which they have accepted and which they produce in evidence of their title. I find nothing in the terms of the reservation in the deed of surrender that would aid them in maintaining a construction of it which would assist their present claim. I cannot, therefore, see that their claim of title by reservation, if conceded, would at all improve their position or confer rights wider or more extended than those assured to them by their provincial patent.

Mr. Rowell contended that because plaintiffs' grants are from the Crown they must receive a construction which would confine the subject matter of the grants strictly to that which is explicitly described. In *Lord v. Commissioners of Sydney*, 12 Moo. P. C. 473, it was held that a Crown grant of lands bordering upon a non-navigable creek carried title to the bed *ad medium filum*. . . . See too *Attorney-General v. Scott*, 34 S. C. R. 603, 615.

Nor does the fact that the Hudson's Bay Company's lands are described as a parcel shewn upon a plan, which indicates the water's edge as one of the boundaries of the parcel, at all affect the rights of the grantee. These rights are precisely the same as if the lands had been described by metes and bounds, and as extending to any lying along the water's edge; *Micklethwaite v. Newberry Bridge Co.*, 33 Ch. D. 133, 145; *Kirchoffer v. Stanbury*, 25 Gr. 413, 418; *Smith v. Millions*, 16 A. R. 140.

In the case of the Hudson's Bay Company, therefore, subject to some reservations in their grant with which I shall deal presently, the question is squarely presented, does a grant from the Crown of lands of defined area, extending to the water's edge of such a stream as the east branch of the Winnipeg river, carry with it title to the river bed *ad medium filum*, and to the superjacent waters and the rights to any power that may be developed from them?

Subject to the effect of special terms in the grant to the Keewatin Power Company, which must be separately dealt with, the same question arises upon that instrument.

Plaintiffs maintain that the English rule under which a grant of lands upon the banks of non-tidal waters entitles the grantee to claim that his lands extend *ad medium filum aquæ*, is in full force in this province; they further contend that as riparian owners, though the *alveus ad medium* should not be held to be included in the grant to them from the Crown, they are entitled to the use—ordinary and extraordinary—of the waters flowing past their lands; they also assert that in any case the titles of riparian owners *prima facie* extend to mid-stream in such portions of navigable waters as are non-navigable owing to natural impediments. Defendants, while fully admitting the common law doctrine prevalent in England, maintain that a different rule must obtain on this continent; that the rule that the ownership of the *alveus* remains in the Crown, confined in England to tidal waters, must here be extended to all waters navigable in fact; that where the waters above and below are navigable, a short watercourse connecting such navigable waters, though obstructed by a non-navigable fall or rapid, must be deemed part of a navigable stretch of water; and that the rights of riparian owners along such obstructed watercourse are the same as those of riparian proprietors whose lands border upon the main bodies of water above and below. They further maintain that any extraordinary use of the waters of a stream, such as for purposes of power development, is incident to the ownership of the *alveus*, and is not the right of a proprietor whose lands extend only to the water's edge.

The doctrine of the common law as administered in England that, whereas in tidal navigable waters the title to the *alveus* is presumed to remain in the Crown unless expressly granted, in all non-tidal rivers, whether, in fact, navigable

or non-navigable, the title to the alveus is presumed to be in the riparian proprietors, is too long and too clearly established to admit of any controversy. Upon the applicability of the latter portion of this rule to navigable non-tidal rivers in Ontario, and to non-navigable portions of navigable water stretches, the parties are at issue. Counsel for plaintiffs concede, however, that whereas in England, upon waters non-tidal but navigable in fact, the public right of navigation depends upon some Act of Parliament, or upon express dedication or prescription, in Ontario, as in the United States, this right exists *jure naturæ* and independently of any statute, proven grant, or presumption from user. This conceded modification of the English doctrine is well warranted by authority: *Regina v. Meyers*, 3 C. P. 305, 346, 351, and many later cases; see too *Caldwell v. McLaren*, 9 App. Cas. at p. 405.

How far, if at all, the doctrines of the English common law are to be otherwise modified in their application to the rivers and lakes of this province is the principal question for determination in these actions. Upon this subject we have had some valuable expressions of judicial opinion in our own Courts. There has also been much discussion in the Courts of the United States upon the same question, which has frequently arisen in various States of the Union.

[Quotations from and references to *Re Provincial Fisheries*, 26 S. C. R. 444, 451, 521; *Barthel v. Scotten*, 24 S. C. R. 367, 370; *The Queen v. Robertson*, 6 S. C. R. 52, 129; *Ratté v. Booth*, 14 A. R. 419, 439; *Parker v. Elliott*, 1 C. P. 470, 489; *Regina v. Meyers*, 3 C. P. 305, 350, 351, 357; *Gage v. Bates*, 7 C. P. 116, 122; *Attorney-General v. Perry*, 15 C. P. 329, 331; *Dickson v. Snetsinger*, 23 C. P. 235, 245; *Warin v. London and Canadian Loan and Agency Co.*, 7 O. R. 705, 722, 723; *Miller v. Great Western R. W. Co.*, 13 U. C. R. 582; *Regina v. Sharp*, 5 P. R. 135; *Kairns v. Turville*, 32 U. C. R. 17; *Re Trent Valley Canal*, 12 O. R. 153.]

In none of these cases does the question now presented appear to have been expressly decided. But the expressions of opinion quoted from Judges of eminence are so clear and numerous that they seem entitled to be accorded the weight of binding authorities. What is there to be found against them? . . .

[Quotations from and reference to *Massawippi Valley R. W. Co. v. Reed*, 33 S. C. R. 457, 468, 469; *The Queen v. Robertson*, 6 S. C. R. 52; *Lord v. Commissioners of Sydney*, 12 Moo. P. C. 473; *Caldwell v. McLaren*, 9 App. Cas. 392, 404; *Re McDonough*, 30 U. C. R. 288.]

I find no other reported case in this province or in England which throws any light upon the question how far our non-tidal navigable waters should be deemed subject to the *ad medium* of the English common law. The weight of judicial opinion of authority in this province distinctly supports the view that the soil in our rivers navigable in fact is presumed to remain in the Crown, unless expressly granted.

The American authorities afford little assistance. The Supreme Court of the United States has held in many cases that grants of land bounded by waters, made without reservation, must be construed according to the law of the State in which the lands lie: *Hardin v. Jordan*, 140 U. S. R. 371; *Mitchell v. Smale*, *ib.* 406; *Grand Rapids v. Butler*, 159 U. S. R. 87; . . . *The Genesee Chief v. Fitzhugh*, 12 How. (U. S.) 443; . . . *Kingman v. Sparrow*, 12 Barb. 201; *Canal Commissioners v. People*, 5 Wend. 446; *United States v. Chandler-Dunbar Co.*, *Wanty, J.*, United States Circuit Court, 20th July, 1905, not reported. . . .

Beyond vague statements that the *ad medium* rule is unsuited to the conditions of non-tidal navigable waters in Canada, and should therefore be held not to be in force, I find no reason advanced in our cases (excepting *Dickson v. Snetsinger*, the ratio decidendi of which seems inapplicable to the western portion of this province) to support the view propounded in the comparatively numerous dicta which I have quoted. While it is obvious that the *ad medium* rule would produce incongruities and almost absurdities, if applied to the great lakes, and must give rise to serious difficulties if held applicable to rivers forming part of the international boundary, I must own that I see no incongruity and no difficulty likely to result from its application to our numerous inland rivers which are navigable in fact.

If the *ad medium* rule should be discarded merely on the ground of unsuitability, where should the line be drawn? Because unsuitable to some of our non-tidal navigable waters, should it be held inapplicable to all? Uniformity might be so attained, but would not that end be practically

achieved by excepting from the application of the rule only the great lakes and the rivers connecting them and other rivers which form part of the international boundary?

How far does merely partial unsuitability warrant the exclusion from our system of jurisprudence of a portion, not of the English statutory law, but of the common law proper?

The Act of 1792, 32 Geo. III. ch. 1, introduced "the laws of England" in the most comprehensive terms. It contained no restricting words, such as "so far as applicable to conditions prevailing in Upper Canada," "so far as local circumstances permit," "so far as such laws can be applied," or "as near as might be."

Upon such qualifying words the Courts have held that certain English statutes, not suitable to young colonies in new countries, were not brought into force by enactments introducing English law in terms otherwise general: *Attorney-General v. Stewart*, 2 Mer. 143; *Whicker v. Hume*, 7 H. L. C. 134; *Rex v. McKinney*, 14 App. Cas. 77; *Yeap Cheah Neo v. Ong Cheng Neo*, L. R. 6 P. C. 381; *Mayor of Lyons v. East India Co.*, 1 Moo. P. C. 175. But, although the statute in question in the three cases first cited (the Mortmain Act) has been held to be in force in Ontario—*Doe Anderson v. Todd*, 2 U. C. R. 82; *Whitby v. Liscombe*, 23 Gr. 1; *Macdonell v. Purcell*, 23 S. C. R. 101—opinions have very much differed as to the sufficiency of the general language of 32 Geo. III. ch. 1 to effect its introduction.

. . . But statute law and common law existing independently of statute are widely different subjects: *Uniacke v. Dickson*, 2 N. S. Rep. (James) 287, 289, 290; and I find no case in which it has been held that a general and unrestricted introduction of English law into ceded territory does not bring into force the entire common law proper, as distinguished from English statutory law. There are, however, several dicta of learned Judges to the effect that the introduction of the common law proper into Upper Canada is subject to the same qualification which has been implied in regard to the statute, namely, that provisions of the English law not applicable to the state and condition of the province were not imported. . . .

[Reference to *Doe Anderson v. Todd*, 2 U. C. R. at p. 86; *Whitby v. Liscombe*, 23 Gr. at p. 37; *Attorney-General*

v. Stewart, 2 Mer. at p. 148; Gage v. Bates, 7 C. P. at p. 129; Dickson v. Snetsinger, 23 C. P. at p. 245; Re Provincial Fisheries, 26 S. C. R. at p. 528.]

Though it be fairly well established that such portions of the English common law proper as were not reasonably applicable to the conditions of this province were not introduced in 1792, yet the application of the criteria of "suitability" and "reasonableness" must, except in the clearest cases, always give rise to difficulty and not infrequently to divergence of opinion: see *Doe Anderson v. Todd*, 2 U. C. R. at p. 87, per Robinson, C.J. Assuming that doctrines of the English common law wholly unsuited to our conditions should be altogether rejected, and other doctrines of the same law applied only so far as they appear to be reasonably adapted to those conditions, in determining to what non-tidal navigable waters in Ontario the English *ad medium* rule is not reasonably applicable, our Courts would encounter many difficult problems, for the solution of which it would scarcely seem possible to prescribe any immutable standard.

That the rights of riparian proprietors may be as little uncertain as possible, it will be better, if a logical basis can be found for that conclusion, that it should be held that the *ad medium* rule does not apply to any waters in this province which are navigable in fact, rather than that the rule applies to such bodies of navigable water as the Courts may from time to time deem fit subjects for its application. I think such a basis exists.

It is conceded that the public right of way upon our non-tidal waters which are navigable in fact has always existed *ex jure naturæ*. That right in these waters is precisely the same as the like right in tidal navigable waters. If the presumption which ascribes to the Crown the title in the soil under English waters navigable in law rests upon the tidal character of such waters, the fact that the right of navigation upon our waters exists *jure naturæ* is not of importance; but, if that presumption arises from the existence *jure naturæ* of the public right of navigation in English tidal waters, then the like right in our non-tidal navigable waters should carry with it the same presumption.

Upon an examination of the English cases, the navigability and not the tidal character of tidal navigable waters appear to be the real foundation of the presumption that the ownership of the soil is vested in the Crown.

Although the flux and reflux of the tide affords *prima facie* evidence of navigability, its strength depends upon the situation and nature of the channel: *Rex v. Montague*, 4 B. & C. 598, 602; *Miles v. Rose*, 5 Taunt. 705; *Mayor of Lyons v. Turner*, Cooper 86. In these and other cases it has been held that many incidents of tidal navigable waters do not extend to non-navigable waters subject to the influence of the sea tides. . . .

[Reference to Woolrych's *Law of Waters*, 2nd ed., p. 42; *Illinois Central R. R. Co. v. Illinios*, 146 U. S. R. 387; *Gann v. Free Fishers of Whitedale*, 11 H. L. C. 192.]

A consideration of the decisions upholding the title of the Crown to the bed of tidal waters has satisfied me that the necessity of fully protecting the public rights of navigation and fishery in the superjacent waters was the dominant, if not the sole, factor in building up the English common law doctrine that the beds of navigable tidal waters are presumed to be vested in the Crown.

The facts that the presumption of navigability was restricted to tidal waters, and that the importance of the public rights in non-tidal navigable rivers was not recognized when title to the lands upon their banks was acquired, account for acquiescence in the claim to title to the alveus made by riparian owners upon the latter class of rivers. That claim, conceded in early days, precluded the application in England to these waters of the presumption in favour of Crown ownership of the alveus which obtained in regard to tidals waters; because when the public right of navigation in non-tidal rivers was asserted, private rights in the soil of the bed had long since become vested. In this country the public right of navigation in all navigable waters has always existed and been recognized. To give the fullest effect to all the incidents which, in the absence of obstacles, that right should carry with it, interferes here with no vested interests. The title to both bed and banks being in the Crown, its grant of the latter may be construed according to the rules which govern the construction of grants made under similar conditions in England.

Unity of title in the Crown to bank and bed only occurs in England in regard to tidal navigable waters. There the nature of the tenure upon which the Crown holds title to the alveus of rivers navigable in law precludes any presumption

of an intention to part with any portion of it, unless such portion is granted in express terms. Since in all waters of this country, which are navigable in fact, the interest of the Crown in the bed is precisely the same as that which it possesses in the fundus of tidal navigable waters in England, it is a logical deduction that by nothing short of an express grant should the Crown be held to have parted with its title to the alveus of our navigable rivers.

Indeed it may not unfairly be said that even in England the application of the *ad medium* rule is restricted to rivers in which the alveus had already become the property of private riparian owners before the public right of navigation in such rivers was established. We have no rivers of the latter class in this country.

When the *raison d'être* of the English *ad medium* rule as applied to non-tidal navigable rivers is understood, and the peculiar conditions under which it became established in England are appreciated, English authorities no longer present formidable obstacles to the acceptance of the proposition enunciated in the many strong expressions of opinion by our own Judges which I have quoted. In our rivers which are navigable in fact, because the public rights in them are recognized to have always existed, *ex jure naturæ*, the title to the alveus must be presumed to remain in the Crown unless expressly granted. It follows that a Crown grant of lands bordering upon such rivers gives title to the grantee only to the water's edge.

But it is argued that in any event the *ad medium* rule should apply to such parts of navigable rivers as are in their natural state non-navigable owing to impediments such as falls or rapids. Such is not my opinion. Once the navigable character of the river is established, up to the point at which navigability entirely ceases, the stream must be deemed a public highway, though above that point it is private property: *The Queen v. Robertson*, 6 S. C. R. 52.

The inconvenience which would ensue were the soil of the bed of the same river in alternate stretches vested in the Crown *juris publici*, and in the riparian owners *juris privati*, affords strong ground for the belief that the law is not in a condition which would produce such results. Then again, though navigation at the falls in the east branch of the Winnipég river is presently impossible, the engineers

say that a canal to overcome the natural obstacle which the falls present is quite possible. Is not the stream even at this point navigable in posse? I think it is.

There is judicial authority for the proposition that a natural interruption of navigation in a river, in its general character navigable, does not change its legal characteristics in that respect at the point of interruption, and that riparian owners are not at such point presumed to own the bed *ad medium filum*: *Re State Reservation at Niagara Falls*, 16 *Abbott's New Cases* (N.Y.) 159, 187, 37 *Hun* 507, 547-8. I do overlook the fact that the river under consideration in this case was international. See too *Broadnax v. Baker*, 94 *N. C.* 675, 681; *Farnham on Waters*, p. 102; *Hurdman v. Thompson*, *Q. R.* 4 *Q. B.* 409, 537, 450.

Gwynne, J., in *McLaren v. Caldwell*, 8 *S. C. R.* 435, at pp. 465-6, expressed obiter the contrary view, basing it upon the judgment of Sir James Macaulay in *Regina v. Meyers*, 3 *C. P.* 305. But on examination Sir James Macaulay's judgment hardly seems to warrant its citation as authority for the proposition of Mr. Justice Gwynne: see p. 352. The judgment of the Supreme Court in *McLaren v. Caldwell* was reversed in the Privy Council, 9 *App. Cas.* 392, but this point is not touched upon in the judgment of the Judicial Committee.

As part of an important stretch of navigable waters the east branch of the Winnipeg river is, in my opinion, at the falls, as well as above and below them, subject to the incidents of navigable waters.

Apart, therefore, from any special terms which they contain, the grants to the plaintiffs do not sustain their claim to the ownership of the bed of the portion of the east branch of the Winnipeg river which flows between their respective properties.

But Mr. Rowell argues that certain reservations in the Hudson's Bay Company's grant and other special provisions in the Keewatin Power Company's grant also require this construction.

The former grant contains these words:—"Saving, excepting, and reserving nevertheless, unto Us, Our Heirs and Successors, the free uses, passage, and enjoyment of, in, over, and upon all navigable waters that shall or may be hereafter found on or under or be flowing through or upon any part of the said parcel or tract of land hereby granted

as aforesaid, reserving also right of access to the shores of all rivers, streams, and lakes for all vessels, boats, and persons, together with the right to use so much of the banks thereof, not exceeding one chain in depth from the water's edge, as may be necessary for fishery purposes."

The reservation of rights of navigation is merely an expression of what would be presumed were there an express grant of the *alveus* itself. It is quite consistent with the patent conveying to the grantee title to the bed of the river *ad medium*. The reservation of the right of access to the shores is, in my opinion, merely incidental to the right of navigation, and also consistent with the grant carrying title to the bed *ad medium*: see *Hawkins v. Mahaffy*, 29 Gr. 326.

But the reservation of the right to use a strip along the bank one chain in depth from the water's edge for fishery purposes is not so easily disposed of. This also is merely an easement, yet it implies that the right of fishery does not pass to the grantee, as it would if the stream were strictly private, and the grant carried title to the soil *ad medium*. The right of fishery is a profit *à prendre* appertaining to the ownership of the *alveus*: *Re Provincial Fisheries*, 26 S. C. R. 444; *Robertson v. The Queen*, 6 S. C. R. 52. If then the grant carried title to the bed of the stream *ad medium*, the right of fishery passing with it, this reservation would be meaningless. Does its presence indicate that it was intended that title to the soil of the bed should remain in the Crown, or merely that the grantee should not have as a property right, incident to his ownership of the soil, an exclusive right of fishery? In *Hindson v. Ashby*, [1896] 2 Ch. 1, at p. 10, Lindley, L. J., says: "It must be taken as now settled that, if the right to a several fishery in a public navigable river is proved to exist, the owner of the fishery is to be presumed to be also the owner of the soil over which his fishery extends, unless there is evidence to the contrary." *Holford v. Bailey*, 8 Q. B. 1000, 1016, 13 Q. B. 426. The presumption would seem to be a *fortiori* in a private river. If then the language of the Hudson's Bay Company's patent implies a reservation of a right of fishing to the Crown for the public, the argument that the soil of the bed of the stream was not intended to pass to the grantee seems cogent. But the view I have taken of the main question renders it unnecessary to determine the nature and effect of this reservation.

In the case of the Keewatin Power Company, however, we find reservations of a very different character. That instrument is, the defendants urge, only consistent with the grantees' title terminating at the water's edge. The letters patent granting Tunnel Island also grant to the Keewatin Power Company in express terms two smaller islands lying in the west branch of the Winnipeg river, between Tunnel Island and the mainland, a block of land on the south shore of the west branch of the river, and all the islets or reefs of rocks and the land under the water in the west branch of the Winnipeg river between Tunnel Island and the block of land upon the south shore granted to the company, "together with the water power adjoining thereto on the west branch or outlet of the said Winnipeg river, the whole herein described land containing 386 acres and a half more or less." This grant is "subject to the condition and understanding that nothing herein contained shall be construed as conferring upon the grantees exclusive rights elsewhere upon the said Lake of the Woods or upon any other streams flowing into or out of the said lake, or shall confer upon the said company power or authority to interfere with or in any way restrict any powers or privileges heretofore enjoyed by Us, or which may hereafter be granted or demised to any other person or company in respect of any other water power on the said Lake of the Woods, or any other stream flowing out of or into the said lake. Provided that any such powers or privileges which may hereafter be granted shall not destroy or derogate from the privileges hereby granted."

The grant of the islets and reefs or rocks and land under water, situate between Tunnel Island and the block of land upon the south shore granted to the company, imports that the grant of the two latter parcels did not carry title to the bed of the river, because, if it did, these rocks or islets and the land under water would, by virtue of that title, become the property of the grantees, and this express grant of them was wholly unnecessary. If the title to the bed of the west branch did not pass, except by this express grant, neither did the title to the bed of the east branch ad medium, of which there is no such express grant. The express grant of the water power on the west branch reinforces this argument. The interpretative words "that nothing herein contained shall be construed as conferring upon the grantees exclusive rights elsewhere upon the said Lake of the Woods, or upon

any other streams flowing into or out of the said lake," render it, in my opinion, impossible to successfully contend that this grant was intended to give to the Keewatin Power Company ownership of the western half of the bed of the east branch of the Winnipeg river—another stream flowing out of the Lake of the Woods—which would carry with it the "exclusive rights" which these plaintiffs now assert. *Lord v. Commissioners of Sydney*, 12 Moo. P.C. 473, 497, 498; *Hare v. Horton*, 5 B. & Ad. 715; *Farnham on Waters*, p. 240. The reservation of the right to demise powers and privileges in respect to other water powers and other streams flowing out of the lake, if possible renders this conclusion still more certain. Upon this ground, as well as upon the non-applicability of the *ad medium* rule to these waters, I am clearly of opinion that the claim of the Keewatin Power Company to the soil of the western half of the bed of the east branch of the Winnipeg river wholly fails.

What then are the rights of the plaintiffs as riparian owners not entitled to the soil of the bed of the stream? There can be no doubt that, subject to any restrictions in the grants under which they take title, riparian owners are entitled to a most extensive usufruct, extraordinary as well as ordinary, of the waters flowing past their lands.

In *Miner v. Gilmour*, 12 Moo. P. C. 131, Lord Kingsdown, delivering the judgment of the Judicial Committee, says at p. 156: "By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. But further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors, either above or below him."

In *North Shore R. W. Co. v. Pion*, 14 App. Cas. 612, Lord Selborne, after quoting the above passage as undoubted law, says at p. 620: "The question whether this general law was, in England, applicable to navigable and tidal rivers arose, and (with the qualification only that the public right of navigation must not be obstructed or interfered with)

was decided in the affirmative by the House of Lords, in *Lyon v. Fishmongers' Co.*, 1 App. Cas. 683. That decision was arrived at, not upon English authorities only, but on grounds of reason and principle, which (if sound, as their Lordships think them) must be applicable to every country in which the same general law of riparian right prevails, unless excluded by some positive rule or binding authority of the *lex loci*." See too *Hamelin v. Bannerman*, [1895] A. C. 237, 240.

Where the banks on either side are vested in the same person, only the rights of owners above and below need be considered in using the waters. But where the banks on either side belong to different persons, the soil of the alveus being not the common property of both, but belonging to each in severalty usque ad medium filum, neither proprietor is entitled to use it in such a manner as to interfere with the natural flow of the stream past the property of the other.

In *Bickett v. Morris*, L. R. 1 Sc. App. 47, these restrictions upon the rights of riparian owners are pointed out, and it is held that "any operation extending into the stream is an interference with the common interests of the opposite riparian proprietor, and, therefore, the act being *prima facie* an encroachment, the onus seems properly to be cast upon the party doing it to shew that it is not an injurious obstruction." p. 56; see too pp. 59 and 61; *Orr Ewing v. Colquhoun*, 2 App. Cas. 845, at p. 861; *Kirchhoffer v. Stanbury*, 25 Gr. 413, 420.

Where the riparian proprietor is not the owner of the part of the alveus adjacent to his land, he has no right to place any erection upon it or to interfere in any way with the bed of the stream. His right to the usufruct of the water is restricted by the limitations that he may not place any erection in the alveus and may not, except for ordinary purposes, employ the water in any manner which interferes with the rights of adjacent proprietors opposite as well as above and below him on the stream. These riparian rights are of course subject to the public right of navigation and to the right of fishery incident to the ownership of the alveus.

Thus limited, this right of usufruct the Hudson's Bay Company, as riparian proprietors, enjoy in the waters of the east branch of the Winnipeg river. So far as this incidental

right enhances the value of the property which the defendants propose to take from these plaintiffs, the latter are entitled to be allowed compensation for it in the pending arbitration.

Prospective capabilities of the property of the plaintiffs, having regard to the extent of their rights as riparian owners, must be taken into consideration, as they may form an important element in determining the real value of the lands: *Lefevre v. The Queen*, 1 Ex. C. R. 121.

If both plaintiffs were entitled to these riparian rights, it may be that they would be justified in asking the arbitrators to treat them as a single proprietor and allow to both jointly the amount by which the value of the lands on both sides of the stream would be enhanced by the usufruct of the water, if such lands were held by a single owner, such usufruct being in that case restricted only by inability to utilize or interfere with the alveus and the riparian rights in the waters of proprietors above and below.

But, in my opinion, the riparian rights of the Keewatin Power Company are less extensive than those of the Hudson's Bay Company. The grant to the Keewatin Power Company is subject to the "express condition and understanding" that nothing contained in it shall confer "upon the grantees exclusive rights elsewhere upon the said Lake of the Woods or upon any other streams flowing into or out of said lake or shall confer upon said company power or authority to interfere with or in any way restrict any powers or privileges heretofore enjoyed by Us or which may hereafter be granted or demised to any other person or company in respect to any other stream flowing out of or into the said lake."

The company are by this patent given certain exclusive rights and water power privileges on the west branch of the Winnipeg river. The east branch of the Winnipeg river is another—the only other—stream flowing out of that lake. Upon this stream the Crown reserves the right to grant or demise water power privileges in nowise restricted. It by implication, if not expressly, withholds from the Keewatin Power Company any rights, riparian or other, which would in any manner hamper or interfere with the fullest enjoyment of any rights which it should thereafter grant or demise, and of such rights as it has now in fact demised to defendants in respect to the water power in question. It follows, I think, that the Keewatin Power Company are entitled only to such usufruct of the waters of the east branch flowing past

Tunnel Island as they may have subject to the limitations already indicated in the case of the Hudson's Bay Company, and also to the further restriction that this usufruct shall in nowise diminish or hamper the powers and privileges of the defendants under their Crown lease and statutory franchise. So far as their riparian interest in these waters thus limited may enhance the value, present and prospective, of the lands of which the defendants propose to deprive these plaintiffs, but no farther, it should be taken into account by the arbitrators in determining the compensation to which they may plaintiffs.

I am also asked by Mr. Nesbitt in the case of the Keewatin Power Company to declare this company entitled to claim compensation from the defendants in the pending arbitration for any injury, present or prospective, which the carrying out of the projected works of the defendants in the east branch may work to the dam of these plaintiffs in the west branch, or to their water power rights or privileges in that watercourse. The grant to the Keewatin Power Company contains this further proviso: "Provided that any such powers or privileges which may hereafter be granted shall not destroy or derogate from the privileges hereby granted." It may be that this proviso will enable these plaintiffs to restrain the defendants from so carrying out their projected works as to interfere with the company's rights and privileges in the west branch, or it may entitle the Keewatin Power Company to claim compensation in damages for any injury which they may sustain by such interference. But that is not a proper question, in my opinion, for consideration upon the present arbitration. There is no evidence before me to warrant a belief that the defendants' works, if carried out as projected, will in any way affect the rights and privileges of these plaintiffs in the west branch. That question must be left open, and nothing done or omitted in the present litigation will in any wise prejudice them, if, at any future time, the Keewatin Power Company seek to prevent or to obtain redress for such injuries. I must, however, decline to now pronounce a declaratory judgment upon this phase of the case presented by these plaintiffs.

It was a term of the settlement during the trial of certain questions at issue between the parties that I should dis-

pose of the costs incurred in respect of those matters as well as the general costs of these actions. Having regard to the nature of the issues, and to the disposition made of the entire case, my discretion as to costs will, I think, be most properly exercised by requiring the respective plaintiffs to pay to the defendants three-fourths of their costs of defending these actions, other than costs incurred upon and as incidental to the motion or motions for injunction, as to which there will be no order.

OCTOBER 8TH, 1906.

DIVISIONAL COURT.

EVENDEN v. STANDARD ART MANUFACTURING CO.

Company — Money Advanced to — Authority of President — Negotiations for Formation of New Company—Failure of Consideration—Recovery of Money Advanced.

Appeal by defendants the Standard Art Manufacturing Co. from the judgment of STREET, J., at the trial, in favour of plaintiff as against the appellants, and cross-appeal by plaintiff against the same judgment dismissing the action as against defendant Dickson. Action to recover \$1,000 alleged to have been advanced to defendants.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, J., CLUTE, J.

W. R. Riddell, K.C., and Z. Gallagher, for defendants.

W. Cassels, K.C., and W. H. Lockhart Gordon, for plaintiff.

CLUTE, J.:— . . . Plaintiff brings this action to recover \$1,000, the amount of two cheques made by him in favour of the Standard Art Manufacturing Co., one for \$250 dated 21st March, 1905, and one for \$750 dated 28th March, 1905, and interest.

Defendant Dickson, at the time of the advance, was president and general manager of defendant company. The company was incorporated on 14th September, 1904, and organized principally, as it would appear, by defendant Dickson.

In January following plaintiff took stock in the said company, and became security for the company with a view of raising money to carry on its business to the extent of some \$2,500. The company finding it difficult to carry on business for lack of capital, negotiations were opened through Dickson with Lillicrap & Tate, who owned a saw-mill in the vicinity of Lakefield, with a view of uniting the interests and plants of both, and in the expectancy of obtaining a bonus of \$15,000 from the village of Lakefield. Negotiations in this direction had proceeded so far that on 9th March an agreement was made between Lillicrap & Tate, of the one part, and Dickson, of the other, with a view of carrying out this proposed arrangement. In that agreement it is recited that Lillicrap & Tate and others are the owners of a saw-mill and about 5 acres of land in the village of Lakefield, together with lumber camps and timber lands containing about 1,000,000 feet of lumber, more or less, with all necessary equipments to carry on their business as lumbermen, and that Dickson owns or controls machinery, plant, stock, etc., for the manufacture of furniture and woodenware, heretofore owned by the Standard Art Manufacturing Co. of Toronto.

It was said that the reason why this agreement was entered into by Dickson instead of the defendant company was because the municipality of Lakefield would have no right to give a bonus to a manufacturing company to induce it to remove from one municipality to another, and that this difficulty was to be avoided by a transfer of the property of defendant company to Dickson, and the arrangement carried out by him. As a matter of fact, at the date of the above agreement Dickson did not own the company's plant. A bill of sale by the company to Dickson of the plant in question is dated 17th April, 1905.

On 15th March, 1905, Dickson and Lillicrap & Tate entered into an agreement with the municipal corporation of the village of Lakefield by which the corporation were to guarantee the payment to the extent of \$15,000 of certain bonds to be issued by the proposed company, under certain terms and conditions therein expressed. With a view of carrying out this arrangement, a charter was applied for and obtained for the new company, of which all the parties concerned, that is Lillicrap, Tate, Dickson, Evenden, and James Morrison, were original incorporators. This charter is dated 31st March, 1905.

It will be seen, therefore, that the \$1,000 was advanced in the manner aforesaid during these negotiations and before the new charter had been obtained, and before defendant company had executed the bill of sale of its plant to Dickson.

It was not disputed that the cheques for the money so advanced, which were made payable to the order of the company, were duly indorsed by defendant Dickson as president of the company, and that the company received the full benefit of the advance. The money never, in any sense, came into the hands of Dickson, nor was any part of it appropriated or used by him. . . .

It is, I think, quite clear, as held by the trial Judge, that the money having come to the hands of defendant company and being used by the company in the ordinary course of their business, plaintiff is *prima facie* entitled to recover. The defendant company, however, seek to be relieved of any liability mainly upon the ground—as I understood the argument of Mr. Riddell — that the company never owed the amount; that the cheques, although payable to the order of the company, were really given to the company at the request of Dickson; and that, assuming that Dickson procured the loan, he had no legal right to do so, and there was no power in the president or manager to borrow money in the way that this was obtained.

The trial Judge has dealt pretty fully with this question. He points out the ground upon which the negotiations fell through, namely, that Dickson refused at the organization meeting of the new company to give a statement of what the Standard Art Manufacturing Co. were going to give for the \$22,000 of stock which they were to receive. With what the trial Judge has said in respect to this matter, I entirely agree. Lillicrap & Tate, having been refused the statement demanded, withdrew and refused to have anything further to do with the organization of the new company. Plaintiff, after taking advice, also declined to have anything to do with the matter.

On 17th May, 1906, defendant Dickson advertised for sale by publication the furniture conveyed to him by defendant company, and entered into negotiations for organizing a new company at Barrie, in which the plant which was intended to form part of the assets of the Lakefield company was to be used for the same purpose for the proposed Barrie

company. In short, the proposed transaction of the Lakefield company fell through, and there was an end of it. A quorum could not be formed; no business could be transacted for lack of a quorum; one of the parties refused to proceed further; and, so far as these negotiations had anything to do with inducing plaintiff to advance his money, they were now entirely out of the question.

But it is said that because, at the suggestion of Dickson, plaintiff agreed to make this advance upon the understanding that these negotiations were to go through, and that he was to receive some \$2,000 stock of the new company in case it did go through, that now he is not entitled to recover his money from anybody, although negotiations have proved abortive. I do not think this view can be maintained. It seems impossible to dissociate Dickson as a private individual from Dickson as president and general manager of the defendant company. The negotiations having fallen through, the facts remain that, at the instance of the president and general manager, plaintiff advanced \$1,000 to the company by cheques payable to their order—that the company assented to this advance, received the money, and properly used the same in the payment of their debts.

I think the principle upon which *Bridgewater Cheese Factory Co. v. Murphy*, 23 A. R. 66, was decided, is applicable to the present case. . . .

I think it must be held that defendant Dickson was acting throughout on behalf of defendant company, of which he was president; that the transaction must be taken as a whole; that he said in effect to plaintiff, "I, as president of this company and general manager, will carry out an arrangement by which the company will transfer their plant to me, with a view of forming the Lakefield company, and you shall have \$2,000 of the stock of that company for this advance to the company;" that these negotiations having fallen through, the proposed consideration for this advance entirely failed; that the money so advanced was never intended as a gift to any one; and that the consideration having failed, plaintiff is entitled to recover his money back.

The answer which is sought to be made to this statement—a I understand the argument—is that Dickson was not acting for the company, nor were the company empowered to enter into such an arrangement. I do not think the company can be allowed to take this position as against plaintiff,

who, as far as one can see, acted bona fide throughout: and, if it is put upon the other ground, that the company through Dickson had no authority to enter into any such arrangement, then equally the consideration wholly fails. But having received plaintiff's money and properly used it for their ordinary purposes, it would be a gross fraud upon plaintiff if now they were permitted to retain that money upon the pretence that their general manager had no authority to negotiate for it.

The appeal should be dismissed with costs, and the cross-appeal dismissed without costs.

BBITTON, J., gave reasons in writing for the same conclusion.

FALCONBRIDGE, C.J., also concurred.

CARTWRIGHT, MASTER.

OCTOBER 9TH, 1906.

CHAMBERS.

LEE v. ELLIS.

Attachment of Debts—Salary of Police Magistrate—Public Officer—Appointment and Termination on Resolution of County Council—Public Policy.

Motion by plaintiffs, judgment creditors, to make absolute an attaching order and garnishing summons.

T. J. W. O'Connor, for plaintiffs.

A. J. Anderson, Toronto Junction, for defendant, judgment debtor.

THE MASTER:—The defendant is police magistrate for the town of Toronto Junction, and also for the county of York. His last quarter's salary in the latter capacity has been attached, and has not yet been paid over.

The question is, can this be distinguished from the case of Central Bank v. Ellis, 20 A. R. 364, against the same defendant? It was there held that his salary as police magistrate for Toronto Junction was exempt from seizure on grounds of public policy, he being, as police magistrate, the holder of "an office which is a public judicial office:" per Osler, J.A., at p. 369.

Mr. O'Connor sought to distinguish the present case because, by secs. 15 and 16 of R. S. O. 1897 ch. 87, appointments of this class are made only on the resolution of the county council, and can be terminated in the same way.

This however, does not, in my opinion, make any substantial difference. Such an officer is just as much the holder of a judicial office during the term of his commission as if he had been appointed under sec. 2 or 3 of the Act. In all the cases under that statute the appointment is made by the Lieutenant-Governor, and the incumbent holds office during pleasure only (sec 1).

Unless there was clear authority for the view set forth by Mr. O'Connor, I should hesitate to hold that the status and consequent rights of police magistrates appointed under sec. 15 are so widely different from those enjoyed by gentlemen appointed under secs. 2 and 3. Both are equally public officers. The only difference is that in one case the Lieutenant-Governor acts on his own motion, in the other he awaits the expression of a desire of the county council that the appointment should be made. He then acts if he sees fit to do so. But it is not less his appointment than are those made under secs. 2 and 3. Nor is the statute affected by the permission given to the county council by sec. 16 to terminate the appointment. It merely states one ground on which the Governor's discretion will be exercised—but it is not the only one.

The motion fails and must be dismissed.

I do not think it is a case for costs, as the point is new.

BOYD, C.

OCTOBER 9TH, 1906.

TRIAL.

FALLS v. GIBB.
FALLS v. YOUNG.

Bankruptcy and Insolvency — Conveyances of Land by Insolvent to Creditors within 60 Days of Assignment for Creditors—Preference—Evidence—Onus—Setting aside — Security Valid in Part—Costs.

Actions by the assignee for the benefit of the creditors of an insolvent to set aside conveyances of land made by the insolvent to defendants as preferential and void

BOYD, C.:— . . . Defendants have not satisfied the onus cast upon them by the statute to shew that they have not obtained an unjust preference. One defendant is son-in-law, the other brother-in-law, of the insolvent. They lent him money at different times, at rates of interest higher than the statutory, without security, and so let the matter run till within 60 days of the assignment. There is no reason given why they became dissatisfied with the notes they had taken for the loans, and were pressing for security. They knew that the insolvent was not able to meet his obligations as they fell due, and that he was increasing the amounts borrowed. He was in the building and contracting business with insufficient capital, and conveyed to these two relatives all his available landed property. Gibb fails more conspicuously than defendant Young, but both have failed . . . to satisfy me that they have overcome the statutory implication which is raised against the transaction: *National Bank v. Morris*, [1892] A. C. 287; *Dana v. McLean*, 2 O. L. R. 466; *Craig v. McKay*, 12 O. L. R. 121, 7 O. W. R. 507.

Young made an advance of \$300 which should be protected, but the rest of his security for \$2,100 is vacated. He will be relieved as to one-seventh of the costs. The rest he will pay to the assignee. Gibb's security is vacated with costs to plaintiff.

BOYD, C.

OCTOBER 9TH, 1906.

TRIAL.

STOVER v. LAVOIA.

Water and Watercourses—Lands Bordering on Navigable Lake—Rights of Riparian Owner—Access over Shoal Water to Deeper Water—Removal of Sand or Gravel from Bed of Lake at Edge of Water—Trespass—Diminution of Soil—Recession of Shore Line—Special Injury—Injunction—Damages.

Action for trespass.

BOYD, C.:—Plaintiff is the owner of land . . . extending to the shore of Lake St. Clair. This land lies between the Great Western Railway and the water, and is in form a low sand bank, sloping to the water's edge. Beyond the water's edge lies a shoal or flat, sloping gradually down to the deep water, which forms the strictly navigable part of the lake. There

is thus, first of all, plaintiff's land going to the shore of the lake, then the shoal belt beyond, ending in the deep navigable water. No doubt, the soil and bed of the lake, shoal and navigable, is vested in the Crown, subject to the rights of the public and of the adjoining riparian proprietors to have access to the navigable waters over the flats and shoals. The point to be first determined is to what limit plaintiff's title extends. I have no doubt that the boundary to the lake shore means and carries to the edge of the water in its natural condition at low-water mark.

Along the shore of a non-tidal river, or of a navigable inland lake, is now well understood to mean along the edge of the water at its lowest mark, both in this country and in the United States. That may be called the American use of the word "shore," which in England is reserved for the ocean, and has there a more limited meaning. Still, since *Throop v. Cobourg and Peterborough R. W. Co.*, 5 C. P. at pp. 531 and 549 (1854), that definition may be considered as not only colloquially but legally accepted. The shore is the space between the bank and the water's edge at still water—the space between high and low water marks. See *Porter v. Elliott*, 1 C. P. 491 note (1854).

The like conclusion was reached in the United States at an earlier period: *Hawkes v. Cutting*, 5 Wheat. 384, where Marshall, C.J., said, "The shore's border on the water's edge, i.e., at low water" (1820).

Plaintiff, thus owning lands bordering on the shore of the lake, is a littoral or lacustrine proprietor. But these are merely more exact terms for expressing what is involved in the more usual and more comprehensive term "riparian proprietor." As riparian proprietor plaintiff has certain rights relative to the lake in front of him, which the law recognizes and will enforce as against unauthorized intermeddlement. He has a right of access over the shoal water near the edge to the deeper water, where navigation practically begins, and a right there to provide a landing place or other convenience for the use of the navigable waters. He has also the right to protect his riparian privilege against any injury likely to arise from the wash of the waves, and also as against any interference with the bed of the lake at the edge of the water by unauthorized removal of the sand or gravel, which forms the natural barrier against the encroachment of the lake:

Lyon v. Fishmongers' Co., 1 App. Cas. 674, 676; Attorney-General v. Tomline, 14 Ch. D. 58; and Yates v. Milwaukee, 10 Wall. (U.S.) 497.

In this case . . . defendant has taken or procured to be taken sand from the very land of plaintiff, and also from the edge of the water adjoining plaintiff's land; and also, as I understand his rather evasive answers, he claims the right as one of the public to take the sand from the bed of the lake along the shore. True, he does not trespass upon plaintiff's land, but he goes down to the water's edge by a road, and then drives his team along the shallow water, and to plaintiff's frontage, and then digs or raises the sand from the meeting place of land and water into his waggon, and carts it off to his own premises. There is some appreciable diminution of soil, and consequent recession of shore line, attributable to the insistent action of defendant. The general effect is that the lake is encroaching more on plaintiff's property than would be naturally the case, and I think plaintiff has a right to seek relief by way of damages and injunction. I would fix the amount of damages at \$15, and grant a perpetual injunction against the removal of the sand and gravel from plaintiff's land, and from the shoal or flat in front of plaintiff's land ending in the lake.

Though the removal of sand from the bed of the lake is matter of public cognizance by the government, it is yet an actionable wrong by any one peculiarly and specially injured beyond the rest of the public. Such is the injury to plaintiff as owner and riparian proprietor of the locus in quo: *Watson v. City of Toronto*, 4 U. C. R. 158.

Costs of suit to plaintiff.

OCTOBER 9TH, 1906.

DIVISIONAL COURT.

CROWN BANK v. BRASH.

Promissory Notes—Forgery of Makers' Names—Indorsement in Name of Firm—Liability of Non-authorizing Partner—Discount by Bank—Notice or Knowledge of Manager—Circumstances giving Rise to Suspicion—Findings of Jury—Disregard of one—Rule 615—Judgment of Court.

Appeal by plaintiffs from judgment of TEETZEL, J., in favour of defendant Brash, upon the findings of a jury,

in an action against the surviving partner of the firm of Brash & Campbell, and against the administrator of the estate of Campbell, the deceased partner, to recover upon certain promissory notes indorsed by Campbell in the firm name and discounted by plaintiffs in the ordinary course of business.

The jury found that the makers' names to the notes were forged by Campbell and discounted by plaintiffs without the knowledge of Brash, and (9) that the plaintiffs, through their local manager, acted honestly and in good faith; but they also found (8) that the manager had notice of the fact that Campbell had no authority from his partner Brash. Upon these findings the action was dismissed against Brash, and plaintiffs appealed.

The appeal was heard by BOYD, C., MAGEE, J., MABEE, J.

F. Arnoldi, K.C., and W. T. McMullen, Woodstock, for plaintiffs.

G. H. Watson, K.C., and J. W. Mahon, Woodstock, for defendant Brash.

BOYD, C.:—The 8th and 9th answers may perhaps be harmonized by reading them as a finding that the local manager was negligent or careless in his dealings and had notice of some irregularities in other matters which, if investigated and followed up, might have led to information that the acting partner was exceeding the limits of his partnership authority, but he failed to do so; yet nevertheless the notes sued on were negotiated and cashed in good faith and with honest action on the part of the bank.

The law is laid down by Lord Blackburn in *Jones v. Gordon*, 2 App. Cas. 628, substantially thus: "Carelessness, negligence, foolishness in not suspecting something wrong, when there are circumstances leading that way, are not enough to constitute a defence, if they fall short of establishing dishonesty. To raise a defence it must appear that the party giving value for a negotiable instrument should be affected with notice that there was something wrong with it. . . . Evidence of carelessness or blindness may with other evidence be good evidence upon the real question, whether he did know that there was something wrong with it. If he was honestly

blundering and careless, and so cashed the note when he ought not to have taken it, still he would be entitled to recover . . . But if he was not honestly blundering or stupid or careless, but must have had a suspicion that something was wrong, and so refrained from asking questions and probing into it lest his suspicion might become knowledge—then that is dishonesty which precludes his claim to relief in a court of justice.”

If the two findings cannot be reconciled, I think the latter is entitled to prevail, and that we should disregard the somewhat vague result conveyed in the 8th question and answer. No time is indicated when the notice of want of authority is to be attributed to the officer of the bank. And upon the evidence I do not think what is reported shews that there was such notice or knowledge of the limited power of the acting partner as makes it inconsistent with fair mercantile dealing that defendant Brash should be called upon to pay. At most there are in the course of business a few unusual items arising which might, if followed up, have disclosed something wrong, and the failure to do so might have weighed with the jury and led them to impute constructive notice; but this is a doctrine not to be imputed into the law of negotiable instruments: *Lord Herschell in London Joint Stock Bank v. Simmons*, [1892] A. C. at p. 221.

The trouble on both sides in this case appears to arise from over-trustfulness both by the bank and the surviving partner. The bank took for granted that the deceased partner had the right to deal in and to use the name of the firm, and had no reason to suspect or investigate whether or not his authority was limited. Defendant Brash had such confidence in his partner that he allowed him practically to do as he liked in the conduct of the business without taking any trouble to supervise or investigate what was going on. If defendant Brash is to be excused for being over-confident in the integrity of his partner, much more may the bank be so in assuming that honesty characterized all the dealings of their customer.

The finding of the jury distinctly repels the idea of bad faith or dishonesty on the part of the bank or its officer, and to that finding, which is well grounded on all the evidence, I think effect should now be given, even if the 8th answer is to be displaced or modified as I have suggested. All the facts are before us, and it would be unfortunate to pro-

long the litigation, which I do not think we need to do if we make use of the power given by Rule 615: *Rogers v. Duncan*, *Cameron's Supreme Court Cases*, p. 363.

MAGEE, J., gave reasons in writing for the same conclusion.

MABEE, J., also concurred.

OCTOBER 10TH, 1906.

DIVISIONAL COURT.

McLEOD v. CLARK.

Attachment of Debts—Division Court—Liability of Garnishees to Primary Debtor—Evidence of.

Appeal by Peter Campbell, one of the garnishees, from the judgment of the 1st Division Court in the county of Middlesex, finding that the appellant was indebted to the primary debtor in the sum of \$203.41, and directing that that amount be applied in satisfaction of the primary creditor's judgment against the primary debtor; and cross-appeal by the primary creditor from the judgment of the same Court discharging the other garnishees, the Dominion Bank.

J. C. Judd, London, for Peter Campbell.

R. K. Cowan, London, for the primary creditor.

H. S. Blackburn, London, for the Dominion Bank.

The judgment of the Court (BOYD, C., MAGEE, J., MABEE, J.), was delivered by

MABEE, J.:—Unless Clark, the primary debtor, could at the date of the garnishee summons have successfully maintained an action against the bank and Campbell, or either garnishee, for the money in question, it is manifest that the primary creditor must fail in these proceedings. I think Clark could not have maintained such an action against Campbell, upon the facts appearing in evidence, and that Campbell's appeal must be allowed with costs, and the garnishee summons as to him dismissed with costs.

I think it is established that \$50, the amount of the promissory note left by Campbell with the bank, and afterwards paid by him, is still in the possession of the bank, and that this money belonged to Clark at the date of the service of the garnishee summons. The cross-appeal of the primary creditor will, therefore, be allowed with costs to the extent of that sum, and judgment will be entered in his favour against the bank for \$50 with interest from 1st January, 1905, with costs in the Division Court.

OCTOBER 10TH, 1906.

C.A.

SHEA v. TORONTO R. W. CO.

*Street Railways—Injury to Passenger Thrown from Car—
Negligence—Contributory Negligence—Evidence for Jury
—Operation of Car — Duty to Passenger Standing on
Platform.*

Appeal by defendants from order of a Divisional Court, 7 O. W. R. 724, dismissing defendants' appeal from judgment of MABEE, J., at the trial, refusing to nonsuit plaintiff after the jury had disagreed.

The action was brought to recover damages for injuries sustained by plaintiff by being thrown from a car of defendants while he was standing on the back platform, smoking, owing to a sudden jerk of the car.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

D. L. McCarthy, for defendants.

H. D. Gamble, for plaintiff.

MOSS, C.J.O.:—Mr. McCarthy's first contention is that plaintiff having voluntarily elected to stand upon the rear platform of defendants' car upon which he was riding, instead of endeavouring to find sitting or standing room in-

side, thereby disentitled himself to complain of anything that happened to him while there, whether through the negligence of defendants or not.

But plaintiff was not on the platform against the will, or in defiance of the rules, of defendants. Passengers are permitted, and when smoking are required, to stand on the rear platform. The act of plaintiff, therefore, in standing there, could not per se constitute negligence. He was there with the knowledge and sanction of defendants, and their duty not to be negligent extended to him as well as to all other passengers.

The trial Judge rightly refused to withdraw the case from the jury on this point.

The other point argued is whether he ought to have withdrawn it from the jury, on the ground that the evidence shewed that plaintiff was the author of his own injury by the negligent manner in which he stood in—as was argued—a dangerous place on the platform.

Plaintiff states that he was holding the upright bar or standard with his right hand, and with his left he had hold of the north side of the car door, his hand resting on the bundle of boards which he had with him. Apparently the jury were unable to pronounce against him on the question of contributory negligence.

As the case is to be submitted to another jury, it is unnecessary and perhaps inadvisable to discuss the evidence. I will only say that it does not appear to me that plaintiff has admitted that his injury arose from his own negligence or that he has admitted facts from which the only inference that could reasonably be drawn is that his injuries were due to his own negligence. And if that be so the case is one for the jury to deal with.

The appeal should be dismissed.

OSLER and MEREDITH, JJ.A., each gave reasons in writing for dismissing the appeal.

GARROW and MACLAREN, JJ.A., also concurred.

MABEE, J.

OCTOBER 11TH, 1906.

CHAMBERS.

LONDON AND WESTERN TRUSTS CO. v. LOSCOMBE.

Third Party Procedure—Action by Liquidators of Insolvent Company against Directors—Illegal Acts Depleting Capital of Company—Relief over against Individual Shareholders in Respect of Payments to them—Rule 209—Scope of—Indemnity, Contribution, or Relief over.

Appeal by third parties and plaintiffs from order of Master in Chambers of 28th September, 1906, giving directions as to trial of third party issues.

C. A. Moss, for third parties.

G. S. Gibbons, London, for plaintiffs.

W. E. Middleton for defendants Wortman and Durand.

MABEE, J.:—Plaintiffs are the liquidators of the Birkbeck Loan Company; defendants were, with several others, directors of that company; the statement of claim sets forth the following alleged causes of action against defendants: (1) that during several years, although the expenses and losses exceeded the profits earned, defendants "declared and paid dividends upon all the various classes of stock" in the Birkbeck Company, and that such payments were illegal and unauthorized; (2) that defendants made several illegal and improper loans, which are fully specified; (3) illegally surrendered certain mortgages; (4) illegally allowed one of the defendants to withdraw from the company \$2,348.74; (5) illegally applied and appropriated \$350 towards the expense of forming a bank; and it is said these illegal acts have depleted the capital stock of the company to the extent of \$70,000.

Defendants Wortman and Durand set up various defences, making general denials, alleging good faith, proper audits, etc., and also alleging that plaintiffs, who represent the shareholders, are not entitled to maintain an action to recover moneys alleged to have been improperly paid to such shareholders; that the shareholders who received the dividends

are practically the same persons who are shareholders at this time; that directions will be asked for on inquiry, and that the moneys, if any, improperly paid be refunded or set off.

The material shews that at the date of the winding-up order there were 126 permanent shareholders and that during the last 6 years the changes in the ownership of permanent shares have numbered 48. I presume this means transfers.

The defendant Wortman, upon an affidavit alleging that he desired to obtain relief over against the shareholders with respect to money paid to them individually, that Moorehouse and Watson are two shareholders, and that he (Wortman) desired to obtain relief over against them to the extent of the moneys paid to them, procured leave to serve a third party notice, and served the same upon Moorehouse and Watson. The affidavit also states that if these third parties appeared he (Wortman) proposed to apply for an order directing them to represent the class of shareholders.

The Master, upon the application of the defendants, made the usual order for trial of the third party issue; and from this both the third parties and the plaintiffs appeal. The Master thought the course pursued might effect a consolidation of 180 possible actions, but, of course, this could not be so unless, as he states, the defendants should succeed in obtaining an order for representation of the other shareholders by the two sought to be brought in. No such order has been applied for, and I do not think any such order could be made. So, as matters stand, if the third party issues are tried as ordered, it will dispose only of the liability of two shareholders, and leave 178 claims to be disposed of in some other way.

It will be observed that the claim for indemnity applies only to one of the 5 separate and distinct causes of action alleged in the statement of claim. I do not think this is the sort of case intended to be covered, . . . by Rule 209. The right of defendants to recover from the various shareholders the dividends paid to them, if any such right exists, does not arise by virtue of a recovery by plaintiffs from defendants of these same moneys—and, unless the right against the shareholders accrues to defendants by reason of a recovery at the instance of plaintiffs, it cannot be an indemnity.

If defendants had any right to recover from the shareholders, they could at any time have taken proceedings against them for the moneys erroneously paid, and if they could not recover upon their own initiative, I do not think their position would be in any way strengthened because plaintiffs recovered from them.

It is not suggested that this is a case of "contribution." It remains then to consider if it falls within the words "any other relief over." I think this also should be limited or confined to the class of cases in which the relief over arises by reason of the defendant being held liable to the plaintiff, and that is not this case. There may be cases where the right is not strictly one of indemnity, but which right has its existence solely because the defendant has been adjudged liable, and the words in question are, I think, intended to apply to such cases only.

It is said that one object of the Rule is to prevent the same question arising between the plaintiff and defendant, and the latter and the third party, being tried in different forums, and the possible scandal of different conclusions being arrived at. The "same question" is not involved in this case. These defendants may be liable to the plaintiffs, and still not be entitled to recover from the shareholders the dividends paid to them. These issues are entirely separate and distinct, and present different considerations, and the evidence will be different.

Other difficulties present themselves by reason of the fact that 3 only out of many directors are sued in this action. The moneys are said to have been paid, or certainly could only have been paid, under a resolution or by-law of the board of directors, and it is by no means clear that these individual defendants could enforce rights over against the shareholders, if any such rights exist, without the presence, as parties to the proceedings, of their fellow directors. Again, if the defendants, or the board as a body, could recover these dividends back from the shareholders, it must be by reason of separate and distinct causes of action against each individual shareholder. I do not think all the shareholders could be joined in one action, and it does not seem proper to permit, by means of this uncertain third party procedure, what could not be effected in an ordinary action, namely, a consolidation of many distinct causes of action against different individuals.

It was stated that there are no creditors of the Birkbeck Company; that the action was brought in the supposed interest of and for the benefit of the shareholders; and that if moneys were recovered from the directors, the only persons entitled would be practically the same body of shareholders to whom the dividends in question had already been paid. The defendants in their defence claim relief as to this feature of the case. Inasmuch as this action is being proceeded with by the liquidators only with the sanction of the Court, there is complete power in the Court to see that no hardship results to the directors in respect to the dividends in dispute; and, if it appears that the only persons who would be entitled to receive them, as part of the depleted capital of the company, if they are recovered from the defendants, are the same persons to whom these moneys have already been paid, the Court may direct that portion of the liquidators' claim in the action to be abandoned; so no real necessity exists for any endeavour to stretch the scope of the third party Rule.

No hardship will result from allowing this appeal, and it is allowed. The order of the Master will be vacated and the service of the third party notice set aside. The defendants must pay the costs of the plaintiffs and the third parties before the Master and of this appeal.

Reference may be had to the following cases; *Parent v. Cook*, 2 O. L. R. 712, 3 O. L. R. 350; *Wynne v. Tempest*, [1897] 1 Ch. 110; *Moore v. Death*, 16 P. R. 296; *Catton v. Bennett*, 26 Ch. D. 161; *Wye v. Hanes*, 16 Ch. D. 489; *Moxam v. Grant*, [1900] 1 Q. B. 88; *Davey v. Corry*, [1901] A.C. 477; *Miller v. Sarnia Gas Co.*, 2 O. L. R. 546; and *H. & L.*, p. 392, and additional cases there referred to.

CARTWRIGHT, MASTER.

OCTOBER 12TH, 1906.

CHAMBERS.

PEPPER v. OTTAWA TYPOGRAPHICAL UNION NO.
102.

*Writ of Summons—Service on President of Trade Union—
Effect of Registration of Union under Ontario Insurance
Act—Body Corporate—Party to Action.*

Motion by defendants to set aside service of a copy of the writ of summons on their president for them.

J. G. O'Donoghue, for defendants.

J. R. Code, for plaintiff.

THE MASTER:—For the motion reliance was placed on *Metallic Roofing Co. v. Local Union No. 30*, 9 O. L. R. 171, 5 O. W. R. 95, and on *Sellars v. Village of Dutton*, 7 O. L. R. 646, 3 O. W. R. 664. In the latter case it was said by Street, J., that a corporation might be created by an Act of Parliament without a direct enactment, but that the language relied on, if not direct, must at least shew by necessary implication the intention to create the corporation. This, he thought, had not been done in that case. In the other case *Osler, J.A.*, says that it was proved that neither of the defendants was incorporated, “nor does either of them appear to be registered anywhere in the name of their association so as to constitute them a quasi-corporate body such as was sued in the *Taff Vale* case, [1901] A. C. 426.”

Here, however, it is alleged and not denied that defendants have been registered under the Insurance Act, R. S. O. 1897 ch. 203. This having been done, sec. 33, sub-sec. 4, provides that “the persons named in the registrar’s certificate” and their associates and successors “shall thenceforward be a body corporate and politic, and shall have the powers, rights, and immunities vested by law in such bodies.”

No mention is made of liabilities, but under the decision in the *Taff Vale* case these would seem to be incident to the powers and rights conferred on the association, even where, as there, it was admitted that the defendants were not a corporation.

Counsel for the motion drew attention to the provisions of R. S. C. 1886 ch. 131. Section 4, sub-sec. 3a, of that Act might be thought to prevent the Court from entertaining the action. However that may be, the question does not arise here, and must be left to be pressed, if relied on, as a matter of defence.

So far as I can see, the service was proper, and the motion should be dismissed with costs to plaintiff in any event. . . .

CARTWRIGHT, MASTER.

OCTOBER 12TH, 1906.

CHAMBERS.

MITCHELL v. HAGERSVILLE CONTRACTING CO.

Venue—Change—Preponderance of Convenience—Witnesses—Expense—Other Considerations.

Motion by defendants to change the venue from *Welland* to *Cayuga*.

H. L. Drayton, for defendants.

R. McKay, for plaintiff.

THE MASTER:—It is admitted that plaintiff was injured, and that this took place at Hagersville, which is about 11 miles from Cayuga and 40 from Welland. Plaintiff resides at Niagara Falls, which is 50 miles from Cayuga and 20 from Welland. Of the 5 persons who witnessed the accident, 4 reside at Hagersville, and the residence of the other is unknown. Besides these 4 witnesses, defendants say they will require 10 more witnesses to give evidence as to the system in use at their quarry, all of whom reside at Hagersville.

Plaintiff is an Italian, and the affidavit in reply is, therefore, excusably made by his solicitor. It states that he will require as witnesses a number of quarry and dynamite men who reside at Niagara Falls, but he cannot say how many until after he has had discovery from defendants. He says also that "plaintiff is unable financially to take a number of experts to Cayuga," and that these are the only class of witnesses who will be required on the issues as developed in the pleadings.

Assuming that plaintiff is limited under 2 Edw. VII. ch. 15 (O.) to 3 such witnesses, this would make 4 with himself.

Assuming that defendants really require and are allowed as experts and otherwise the full number of 14 witnesses, the case will then stand as follows. They must go with 14 witnesses 30 miles further to Welland than to Cayuga. Allowing return fare at 5 cents a mile this would make only \$21. But, if the change was made, plaintiff must go 30 miles or more extra with his 3 experts at an extra expense of \$6 or \$7 at least.

It seems clear that under *McDonald v. Dawson*, 8 O. L. R. 72, 3 O. W. R. 773, the motion must be dismissed. That case is a good deal stronger in its facts in favour of a change than the present, as the difference in expense was really considerable. Here it is comparatively trifling.

Something was said on the argument about the inconvenience to witnesses; but the Court will never inquire as to this: per Pose, J., in *Standard Drain Pipe Co. v. Town of Fort William*, 16 P. R. 404; see to the same effect the judgment of Meredith, J., in *Saskatchewan Land and Homestead Co. v. Leadley*, 9 O. L. R. at p. 550.

It was also said that it would be inconvenient to get from Hagersville to Welland in time for the opening of the Court on 19th November, being a Monday. Plaintiff's solicitor says this is a mistake, and that in any case he has other actions in which he acts for the plaintiffs therein, and that he will set one or more of these down first, so that defendants can safely arrive at Welland on Monday afternoon or Tuesday morning.

There seems, therefore, to be no reasonable ground for a change of venue. There is no such substantial preponderance of convenience as is necessary to displace "the right of the plaintiff as dominus litis to control the course of litigation:" per Boyd, C., in *McDonald v. Dawson*, supra. . .

Motion dismissed; costs in the cause.

OCTOBER 13TH, 1906.

DIVISIONAL COURT.

FINCH v. NORTHERN NAVIGATION CO.

Master and Servant—Death of Servant—Destruction of Vessel by Fire—Negligence—Warning—Watchman—Common Employment—Findings of Jury—Absence of Evidence to Sustain—Nonsuit.

Appeal by plaintiff from judgment of ANGLIN, J., dismissing the action, which was brought by the widow of Lyman Finch, a deck hand on defendants' steamer "Collingwood," to recover damages for his death. The steamer was burned on the morning of 19th June, 1905, while moored at the wharf at Collingwood, and Lynch perished in the boat, but precisely how was not shewn.

The action was tried with a jury, who answered certain questions, as set out below, but the Judge, notwithstanding the findings, entered judgment as of nonsuit, from which plaintiff appealed.

A. G. MacKay, K.C., for plaintiff.

Wallace Nesbitt, K.C., and Britton Osler, for defendants.

The judgment of the Court (FALCONBRIDGE, C.J., MAGEE, J., CLUTE, J.), was delivered by

CLUTE, J.:—The following are the questions submitted to the jury and the answers thereto:—

1. Was plaintiff's husband burned to death on the steamer "Collingwood?" A. Yes.

2. Did defendants fail to provide for proper and reasonable watching in the boiler and engine department of the steamer? A. Yes.

3. If so, was such failure the cause of the death of plaintiff's husband? A. Yes.

4. Who was responsible for such failure to provide watching in the boiler and engine department, if you find there was such failure? A. Mr. Gildersleeve.

5. Were all the persons sleeping in the forecastle awakened and warned of the fire in time to have enabled them to escape from the burning steamer? A. No.

6. Could Handy have awakened them in time to escape after he discovered the fire? A. No.

7. At what sum do you assess plaintiff's damages? A. \$1,200.

There was, I think, sufficient evidence to support the first finding, that plaintiff's husband was burned to death on the steamer "Collingwood."

As to the second finding, I cannot say that there was no evidence which ought to have been submitted to the jury upon this point. A special watch had been provided for the engineer's department for 11 years. This was discontinued last year owing to the dismissal of a portion of the engineer's staff, and a change by the general manager of the system of watch. It might fairly be inferred, I think, that if for 11 years a special watch were necessary for the engineer's department, the discontinuance of that watch was the neglect of a reasonable precaution of safety.

With reference to the third finding, however, after a careful perusal of the evidence I am unable to find any evidence which can fairly be said to prove that the failure of defendants to provide a watch in the engine department was the cause of the death of plaintiff's husband. The evidence fails to shew that, even had there been an additional watchman, a different result would have followed. It is not shewn that with such watch deceased would have been forewarned in time to escape. It is not disputed that men sleeping in the forecastle did escape after they were warned. It does not appear that the deceased had not time to escape. For all that is known to the contrary, he may have succumbed to the smoke after reaching the deck, or from some other cause. I have searched the evidence in vain to find somewhere some proof that the additional watch suggested would have saved the deceased, and I find no evidence from which one may fairly say that the lack of such watch was the cause of his death.

It does not appear that there was not time to have fully warned the men after the fire was discovered, and if they were not warned this would be owing to the neglect of Handy, the watchman. Now, he was a person in common employment with deceased, and the statute does not avail in this case to enable plaintiff to escape from the defence raised by common employment. This, I think, is clear. The statute does not give a workman remedy against his employer for the negligence of a fellow servant, except in the cases therein specified: *Wakeley v. Holloway*, 62 L. T. N. S. 639; *Wild v. Waygood*, [1892] 1 Q. B. 783; *McEvoy v. Waterford Steamboat Co.*, 18 L. R. Ir. 159.

The Employers Liability Act (England), of which our Workmen's Compensation for Injuries Act is a copy, was introduced to bring back the law to what it was supposed to be in England before . . . *Priestley v. Fowler*, 3 M. & W. 1, and the effect of the statute is stated by Smith, J., in *Weblin v. Ballard*, 17 Q. B. D. 125; . . . *Thomas v. Quartermaine*, 18 Q. B. D. 685.

Now, a workman is *prima facie* entitled to recover where the employer—be he private employer or corporation—has delegated his duty of superintendence to other persons, and such other persons have caused injury to the workman by negligently performing the duties and powers delegated to them, but the doctrine of common employment, so far as it is not abrogated, remains.

There was no evidence that Handy, who had formerly been a fireman, was not a proper person for the watch, or that there was negligence on the part of the superintendent or general manager in appointing him. If it can be said that there was negligence on the part of any one which caused the death of plaintiff's husband, it was that of the watchman, a person in common employment with deceased, and on account of whose negligence plaintiff is not entitled to recover.

I agree with the trial Judge "that there is no evidence upon which a jury of reasonable men could be asked to find that such failure was the cause of the death of plaintiff's husband. Upon the evidence it is purely conjectural what caused his death, and upon the whole case I can find nothing which would warrant a jury in finding that it was caused by the want of an additional watchman or would have been prevented had such watchman been provided."

Appeal dismissed with costs.

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HODGINS, MASTER IN ORDINARY. MAY 17TH, 1906.

MASTER'S OFFICE.

RE OSHAWA HEAT, LIGHT, AND POWER CO.

EX PARTE SHERIFF OF ONTARIO.

*Company — Winding-up — Writ of Execution — Seizure by
Sheriff of Goods of Company — Fees and Possession
Money.*

Motion by the liquidator for an order directing the sheriff of Ontario to deliver to him the goods and chattels seized by the sheriff under a writ of execution issued by the Port Credit Brick Company against the company in liquidation.

A. H. Beaton, for liquidator.

R. C. H. Cassels, for sheriff of Ontario.

Shirley Denison, for execution creditor.

F. Ford, for another creditor.

THE MASTER:—The writ of execution was placed in the sheriff's hands on 28th February, 1906, for the levy of \$650 debt and \$127.44 costs, and under it on 23rd March the sheriff seized a quantity of the goods and chattels of the company which were then in the hands of the bailiff of the 1st Division Court in the county of Ontario, which the bailiff had seized under an execution dated 19th March, issued out of that Division Court.

The winding-up order was made on 23rd March, 1906.

The 66th section of the Winding-up Act, R. S. C. ch. 129, provides that "no lien or privilege upon either the real or personal property of the company shall be created for the amount of any judgment debt or of the interest thereon by the issue or delivery to the sheriff of any writ of execution or by levying upon or seizing under such writ the effects or estate of the company . . . if before payment over to the plaintiff of the moneys actually levied, paid, or received under such writ . . . the winding-up of the business of the company has commenced; but this section shall not affect any lien or privilege for costs which the plaintiff possesses under the law of the province in which such writ was issued." This section first appeared in sec. 13 of the Insolvent Act of 1865, and was re-enacted as sec. 83 of the Canada Insolvent Act of 1875; and the decisions under that Act are therefore material.

The section of the Insolvent Act of 1865 was construed in *Re Hayden*, 29 U. C. R. 262, where it was held that a judgment creditor who had an execution in the sheriff's hands at the making of an assignment by the judgment debtor was entitled to rank for his costs of the judgment as a privileged creditor against the insolvent. In giving judgment Morrison, J., said: "Before the Insolvent Acts an execution creditor when he placed his writ in the sheriff's hands had a peculiar lien on his debtor's property to the extent of his debt and costs. The Insolvent Act, by the 13th section above cited, deprived him of that lien for his judgment debt . . . but the section further provided that it should not apply to nor affect any lien or privilege for costs which the plaintiff possessed under the law of that part of the then province, in which such issued." "As a lien for such costs did exist in Upper Canada before the passing of the Act for the amount of those costs on the debtor's goods when the execution was placed in the sheriff's hands, it is only reasonable to assume and hold that such lien and the right to recover those costs in full should not be affected by the provisions of the 13th section, but that the same should be secured to the judgment debtor as a privileged claim on the assets of the estate."

A similar result was arrived at by the Judge of the County of Wentworth in *Re Fair and Burst*, 2 U. C. L. J. N. S. 216 (1866), and his decision was confirmed on appeal.

These decisions were followed by me in *Re Erie Glass Company*, decided 27th March, 1894 (not reported), where after argument I allowed the execution creditors the costs of their judgment and the sheriff's fees up to a fixed date.

In *Smith v. Antipitzky*, 10 C. L. T. Occ. N. 368 (1890), McDougall, Co.J., in disposing of a somewhat similar question between an assignee for the benefit of creditors and a sheriff, said: "Under the provisions of this Act (R. S. O. 1887 ch. 124, sec. 9), a debtor may assign to any one; and although it is true any such assignee becomes subject to the general control of the Court, and may be removed by the Court for cause, still he is not an officer of the Court in the sense that the sheriff is, or as were the official assignees under the repealed Insolvent Act." And he held that it would therefore be unreasonable that "the execution creditor who was in possession should be compelled to withdraw and look to a stranger to realize and pay his lien." But in the case before me the liquidator is an officer of, and appointed by, the Court, as is the sheriff; and on his appointment he is directed by the 30th section of the Winding-up Act to "take into his custody or under his control all the property, effects, and choses in action to which the company is or appears to be entitled," which when read with the statutory injunction contained in sec. 17 of the Winding-up Act, "that . . . execution put in force against the estate or effects of the company after the making of the winding-up order shall be void," practically operates as ousting the sheriff's possession of the insolvent company's goods seized by him, and under a writ of execution issued out of a provincial Court, but subject to the lien protected by the latter part of sec. 66.

From the affidavit filed by the sheriff it appears that on 29th March he was advised by the solicitors for the execution creditors that a winding-up order had been made, and on 2nd April he wrote to the provisional liquidator requesting a copy of the winding-up order and intimating that, upon payment of fees, etc., and instructions from the plaintiffs' solicitors, he would be glad to hand over the goods to the representative of the liquidator. On 7th April the provisional liquidator replied that he would on 11th April "ask the direction of the Court as to what action is to be taken in regard to the same."

As there appears to have been no demand from the liquidator for the delivery over by the sheriff of the goods

and chattels he had seized until the 5th May, and as he therefore had to continue to hold and protect them until the order was made for their delivery over to the liquidator, I think the sheriff is entitled to his fees and to possession money up to the date of such order. Costs of all parties to be added to their claims.

OCTOBER 12TH, 1906.

DIVISIONAL COURT.

LEBU v. GRAND TRUNK R. W. CO.

Railway—Animal Killed on Track—Escape to Highway from Enclosure—Open Gate from Highway to Track—Negligence—Liability.

Appeal by plaintiff from judgment of County Court of Kent.

Plaintiff, a livery stable keeper at Bothwell, owned a field adjoining defendants' railway, in which he had a horse at pasture. The animal escaped from the field and got upon the highway, went a short distance, and passed through a gateway into defendants' freight yards, and on to the track, where it was killed by a train. Plaintiff claimed \$150 damages. The action was tried by the Judge of the County Court without a jury, and dismissed with costs.

O. L. Lewis, Chatham, for plaintiff.

W. Nesbitt, K.C., and Frank McCarthy, for defendants.

The judgment of the Court (BOYD, C., MAGEE, J., MABEE, J.), was delivered by

BOYD, C.:—Section 237, sub-sec. 4, of the Dominion Railway Act, 1903, provides that if an animal at large upon the highway . . . gets upon the property of the railway company and is killed . . . the owner may recover the amount of his loss from the company—unless it be proved that the animal got at large through the negligence, &c., of the owner. The earlier sub-sections are restricted to cases where an animal at large upon the highway is killed or injured at the point of intersection of the highway with a level railway crossing—where recovery cannot be had if the animal is at large contrary to the provisions of the section. But

in the last and new sub-section, there may be recovery for an animal at large killed upon the property of the railway company by a train, though the animal was not in charge of a competent person. This large and liberal meaning has been given to this new sub-section in various cases—some being in the Divisional Court, such as *Bacon v. Grand Trunk R. W. Co.*, 7 O. W. R. 753, and *Arthur v. Central Ontario R. W. Co.*, ib. 527, and also 11 O. L. R. 537, and we see no reason to disagree with such a reading.

This plaintiff's case was made out upon the evidence. His horse escaped from the enclosure by jumping a gate without the owner's knowledge. The animal thus got on a public street, and going down the street came to an opening which led down to the track. This opening was furnished with a gate, but the gate was left open by the company, and through this open gate the horse got on to the track where it was killed by the train.

There was a case of negligence made as against the company by the failure to have the place fenced or properly protected through which the horse reached the company's track, under the Act, sec. 199, which could not have been withdrawn from the jury.

Upon the submission before us that no further evidence could be given, and that we were to dispose of the controversy as it now stands, we think plaintiff should have judgment for the amount agreed upon as the value of the horse—with costs of action and appeal.

TEETZEL, J.

OCTOBER 15TH, 1906.

ELECTION COURT—CHAMBERS.

REPORT ARTHUR AND RAINY RIVER PROVINCIAL
ELECTION.

PRESTON v. KENNEDY.

Parliamentary Elections — Controverted Election Petition — Particulars — Scrutiny — Supplemental Particulars after Scrutiny Begun and Adjourned—New Charges—Controverted Election Rules 20, 24—Costs.

Motion by respondent for leave to add further particulars of votes which he intended to object to on the scrutiny.

H. M. Mowat, K.C., for respondent.

I. F. Hellmuth, K.C., and W. J. Elliott, for petitioner.

TEETZEL, J.:—The trial of the petition, other than the scrutiny, took place in September, 1905, and after an appeal from rulings of the trial Judges in regard to certain votes which the petitioner objected to, the matter of the scrutiny came before me in July last at Port Arthur, and several votes given for the respondent were struck off, and in the result so far the petitioner appeared to be in a majority. The parties not being ready to proceed to complete the scrutiny, the further trial of it has been adjourned from time to time until 7th January next.

The respondent has already filed and served particulars of votes objected to by him.

The petitioner contends that I have no discretion, under Rule 24 of the General Rules respecting the trial of election petitions, to allow the respondent to add new particulars of other votes objected to, but that the Rule aims simply at giving further details of particulars already served.

The Rule reads as follows: "The Court or a Judge may at any time order such further particulars as may be necessary to prevent surprise and unnecessary expense, and to ensure a fair and effectual trial, in the same manner as in ordinary proceedings in the High Court of Justice, and as prescribed by the said Act, and upon such terms as may be ordered."

Rule 20 provides for the particulars being served 14 days before the trial.

In the absence of precedent, I am of opinion that the Rule has not the limited meaning urged by the petitioner, but that, for the purposes of ensuring a fair and effectual trial, the Court or a Judge may allow either party to serve further particulars in respect of other votes objected to than those mentioned in the original particulars. I think the word "particulars" in Rule 24 must mean particulars "of votes intended to be objected to," this being the language of Rule 20, and is not confined to further details of particulars already given.

It was also urged by the petitioner that certain votes objected to in the proposed particulars were not invalid votes, assuming the facts to be true as stated in the particulars: that is to say, those that are alleged to have voted on trans-

fer certificates obtained from the returning officer, without any personal or written request.

I am inclined to think that while this class of votes was not actually under consideration by the Court of Appeal, there are sufficient dicta in the judgments of the Court (ante 46) to strongly support a contention that such votes are invalid.

Without deciding that question until the evidence is in, I am of opinion that it is not unreasonable for the purpose of securing a fair and effectual trial of the petition, that the respondent should be allowed to serve the additional particulars, but I think, in view of the lateness of his motion, and that it is an indulgence that he is asking, that the costs of the motion should be costs in the matter to the petitioner in any event.

I stated upon the argument that should I come to the conclusion that the respondent's motion should be granted, a similar privilege should be granted to the petitioner if he desires to supplement his particulars.

This order is not to prejudice any application the petitioner may make at the trial to have the costs of the petition paid by the respondent, should it appear that but for the added particulars the respondent would have lost his seat.

MABEE, J.

OCTOBER 16TH, 1906.

CHAMBERS.

HAMILTON v. HODGE.

Venue—Change—Convenience—Action to Set aside Tax Sale.

Appeal by plaintiff from order of Master in Chambers, ante 351, changing the venue from Toronto to Port Arthur.

J. W. Bain, for plaintiff.

T. D. Delamere, K.C., for defendants.

MABEE, J., dismissed the appeal with costs to defendant in any event.

MABEE, J.

OCTOBER 17TH, 1906.

CHAMBERS.

GYORGY v. DAWSON.

(Two Actions.)

Security for Costs—Plaintiff Leaving Jurisdiction pendente Lite—Application for Security after Trial—New Trial Ordered—Delay in Applying.

Appeal by plaintiff from orders of local Judge at Welland requiring plaintiff to give security for costs of these actions.

R. McKay, for plaintiff.

W. M. Douglas, K.C., for defendants.

MABEE, J.:—The actions were commenced on 12th November, 1903, tried on 15th May, 1905, and dismissed. Upon plaintiff's appeal, a Divisional Court in November, 1905, set aside the trial judgments, and granted new trials, and the Court of Appeal in February, 1906, refused to disturb the disposition made of the actions by the Divisional Court. An order was made by Teetzel, J., on 24th April, 1906, upon appeal by plaintiff from an order made by the local Judge at Welland, under which defendants were given leave to examine plaintiff for discovery "in case the plaintiff shall return to the province of Ontario on or before 15th June, 1906," and an affidavit of plaintiff's solicitor filed upon that motion stated that plaintiff had for some time prior to that date been out of the jurisdiction of the Court, being at Sarkosbylok, in Hungary. Plaintiff did not return. The order of 24th April gave defendants leave to issue a commission to Hungary for his examination in the event of his not returning by 15th June; they did not avail themselves of that term of the order, but on 1st October instant they served notice of motion for the orders now in appeal. It was not suggested that plaintiff was not still in Hungary. It is said the delay in applying for these orders deprives defendants of their right to security. I think defendants could not have reasonably made an application for security before 15th June, and the cases shew that the delay from that date to 1st

October is not such laches as prevents defendants from asserting their right to the orders now in appeal. No costs were incurred by either party during this interval. It is said that these orders will prevent a trial at Welland in November. This may be so; I cannot say. Even if so, I do not think it an answer to defendants' application. Defendants are not to blame because plaintiff left the jurisdiction; they cannot compel his return; they ask what it seems to be the practice of the Court to grant as against absent plaintiffs.

I think the orders were properly made, and the appeals fail. Costs to defendants in any event. If plaintiff desires, the time for giving security may be extended.

The following cases were cited: Bertudato v. Fauquier, 22 Occ. N. 34, 38 C. L. J. 79; Sharp v. Grand Trunk R. W. Co., 1 O. L. R. 200; Small v. Henderson, 18 P. R. 314; Hatley v. Merchants Despatch Co., 11 P. R. 9; S. C., 10 P. R. 253; Hollingsworth v. Hollingsworth, 10 P. R. 58; Codd v. Delap, 15 P.R. 374; Tanner v. Weiland, 19 P.R. 149.

OCTOBER 17TH, 1906.

DIVISIONAL COURT.

CUDAHÉE v. TOWNSHIP OF MARA.

*Ditches and Watercourses Act — Award — Reconsideration—
Construction of Ditch—Charge for Engineer's Services—
Letting Work—Breach of Contract—Reletting.*

Appeal by defendants from judgment of senior Judge of County Court of Ontario restraining defendants from taking proceedings for recovery of the amount charged against plaintiff's lands by reason of the construction of a ditch under the provisions of the Ditches and Watercourses Act.

D. Inglis Grant, Orillia, for defendants.

R. D. Gunn, K.C., for plaintiff.

The judgment of the Court (MULOCK, C.J., ANGLIN, J., CLUTE, J.), was delivered by

MULOCK, C.J.:—One James Corrigan, the owner of the south half of lot 15 in the 8th concession of the township of Mara, required the construction of a ditch for the drainage of his land, and to that end served the owners of the other lands to be affected, with the notice required by sec. 8 of the Act, but, the owners having failed to arrive at an agreement in respect of the work, Corrigan filed with the clerk of the municipality a requisition in accordance with the provisions of sec. 13, and, thereupon, having taken the necessary steps, Mr. Kelly, the engineer, made his award, whereby he found that the ditch was required, and specified its location, description, and course, and apportioned the cost.

This ditch was accordingly constructed from the northern boundary of Corrigan's land for a certain distance upon that of plaintiff, and was there connected with an existing ditch, which it was supposed would carry off the water. It did not, however, accomplish this purpose, but discharged it upon plaintiff's lands.

After an expiry of two years from the completion of the ditch, plaintiff, being one of the owners affected, took the proceedings contemplated by sec. 36 of the Act for a reconsideration of the award. Thereupon Mr. Fitton, who had succeeded Mr. Kelly as engineer of the township, proceeded under the Act to reconsider the award, and made his amended award, whereby he required the ditch to be extended into the lands of one Kelly which adjoined on the east those of plaintiff.

After various delays the ditch was constructed as required by Mr. Fitton's award, and the cost, including the engineer's charges, was apportioned amongst the owners of the lands affected. Plaintiff refused to pay the portion adjudged against her, and the council, under the authority of sec. 30, caused the amount to be placed upon the collector's roll and a warrant to be issued for its recovery by distress, as in the case of taxes. Plaintiff thereupon instituted this action, alleging the illegality of the amended award and praying for an injunction restraining defendants from proceeding to collect the amount so charged against her on the collector's roll.

One objection taken by plaintiff to the validity of the amended award is that Kelly having by his award specified the location, description, and course of the ditch, its com-

mencement and termination, it was not competent for Fitton to amend these specifications. We are unable to accede to this contention.

Section 36 enacts "that any owner party to the award whose lands are affected by a ditch, whether constructed under this Act or any other Act respecting ditches and water-courses, may, at any time after the expiration of two years from the completion of the construction thereof . . . take proceedings for the reconsideration of the . . . award under which it was constructed, and in every such case he shall take the same proceedings, and in the same form and manner, as are hereinbefore provided in the case of the construction of a ditch."

We are of opinion that by virtue of this section the engineer, on the reconsideration of an award, may make whatever award might have been made in the first instance. Under the notice given by Corrigan it would have been competent for the engineer Kelly to have specified such a ditch as that described in Fitton's award, but not having done so, the powers created by the notice and requisition remained not exhausted but merely in abeyance and capable of being exercised whenever "any owner party to the award" took proceedings necessary for its reconsideration. This plaintiff did, and she was a person having the necessary status as such "owner party," etc., entitling her to such reconsideration.

Another objection is that an illegal amount for engineer's services is included in the claim against plaintiff. It is admitted that in accordance with the provisions of sub-sec. 2 of sec. 4, the council, by by-law, fixed the charges to be made by the engineer for his services under the Act at the rate of \$5 a day, and, under sec. 29, the engineer certified to the clerk of the municipality that he was entitled to \$45 for fees and charges for his services. It does not follow, we think, from this detailed account of his services, that he has charged more than \$5 a day for his services. Prima facie his certificate established the validity of his claim for \$45, and the onus was on plaintiff to shew its incorrectness. This was not done, and we cannot assume it, and must therefore overrule the objection.

Another objection is that the work was let to the lowest bidder, and security taken for its due performance; that the contractor failed to perform the work; and that the municipi-

pality should have proceeded to recover damages for breach of contract, and not have re-let the work. This objection appears to be met by sub-sec. 4 of sec. 28, which enacts that "the engineer may let the work and supply of material or any part thereof, by the award directed, a second time or oftener, if it becomes necessary in order to secure its performance and completion."

We think the appeal should be allowed and plaintiff's action dismissed. As to costs, the engineer's certificate, as to the amount owing to him for his charges, was sufficiently vague to have misled plaintiff into believing that an illegal amount was being levied against her land, and it thus afforded some excuse for her having instituted the present action. We therefore think she should not be charged with costs. This appeal is allowed without costs and plaintiff's action dismissed without costs.

CARTWRIGHT, MASTER.

OCTOBER 19TH, 1906.

CHAMBERS.

WAGAR v. CARSCALLEN.

Pleading—Statement of Claim—Striking out—Embarrassment—Fraud—Setting out Facts and Circumstances—Anticipating Defence—Leave to Amend.

Motion by defendants to strike out paragraphs 4., 7., and 9 and part of paragraph 8 of the statement of claim.

Plaintiff, who was over 66 years of age, sought to recover from her daughter and her son-in-law \$10,000. Plaintiff alleges that she was induced by fraud and intimidation to make a deed of the land in question, which was afterwards sold for \$10,000.

C. A. Moss, for defendants.

J. H. Spence, for plaintiff.

THE MASTER:—Paragraphs 4, 7, and 8 are objected to as being embarrassing and irrelevant and at most being a pleading of evidence.

There is no doubt that they contain allegation of matters of fact and of things done by defendants to induce plaintiff by threats of having her declared insane, and by cruelty after they had induced her to go and reside with them, to give her daughter the conveyance of the land.

These, however, are to be considered in view of the basis of the action, which is fraud. As to this Lord Watson said in *Salomon v. Salomon*, [1897] A. C. at p. 35: "A relevant charge of fraud ought to disclose facts necessitating the inference that a fraud was perpetrated upon some person specified." The paragraphs in question seem only to be a compliance with this rule. They contain some of the material facts at least on which plaintiff will rely to prove her case. Merely to allege a fraud would not be enough. Such a statement of claim must be amended. Otherwise the defendant in such an action would be left in ignorance of what was meant.

Paragraph 9 is in a somewhat different position. The deed complained of was made on 8th March last. Paragraph 9 alleges that on the previous day the daughter, by way of colourable consideration for the deed, covenanted with plaintiff to keep her during her life, and if she wished to live elsewhere to pay her \$3.50 a week and furnish her with all necessaries in sickness as in health. It concludes as follows: "The said defendant in said agreement further covenanted that she would not sell or convey said lands during the lifetime of the plaintiff." No doubt, in one aspect, this is anticipating a possible defence, and so is premature. But another is that the agreement of 7th March required defendants to do certain things as a term of the deed which plaintiff was to give and did give the next day; that this was part of the whole scheme to get the deed from plaintiff, in which it would be a very important factor (if true) that the undertaking not to alienate the lands during plaintiff's life was in the agreement, but was left out of the deed, whereby plaintiff was deprived of a most important protection which was to have been reserved to her.

This 9th paragraph might, no doubt, have been made fuller and more explicit if the agreement is as I supposed it to be. The fact of the land being two lots in the city of Oakland, in California, has probably had a good deal to do with the action and the complications that have arisen. Had land of any such value in the county of Leeds and Addington

been dealt with in this way, no doubt the solicitors would have required that plaintiff should have independent advice and would have declined to act for both parties, and pointed out to defendants that this was a wise, if not a necessary precaution, in case the transaction should be afterwards impeached. It was stated on the argument that when these lots were conveyed they were of comparatively little value. It was due to the great earthquake in the following month at San Francisco that these small lots, containing only less than a tenth of an acre and being 50 feet x 100, appreciated to such an extent as \$10,000.

The order will therefore be a dismissal of the motion as to paragraphs 4, 7, and 8. As to paragraph 9, plaintiff may have leave to amend her statement of claim (and otherwise) if so advised within a week. Time for delivery of statement of defence to be extended for one week thereafter.

It is much to be wished that some satisfactory arrangement may be reached, and prevent such painful litigation becoming a matter of public notoriety.

It may not be out of place to remark that the language of Lord Selborne and Brett, L.J., in *Millington v. Loring*, 6 Q. B. D. 190, at p. 194, seems to give ample authority for the allegations complained of, in an action of this character. Being on the equity side of the Court the pleadings are properly fuller than where a plaintiff is bringing a common law action.

CARTWRIGHT, MASTER.

OCTOBER 19TH, 1906.

CHAMBERS.

HOLDSWORTH v. GAUNT.

Dismissal of Action—Want of Prosecution—End of Cause of Action—Dispute as to—Summary Jurisdiction to Dispose of Costs in Chambers.

This action for alleged infringement of a patent was commenced on 11th December, 1903. The statement of claim was delivered in due course, and the statement of defence on 2nd February, 1904. A motion for particulars of the defence was served on the 24th of that month.

Shortly after this defendants went out of business, and nothing more was done by either side until November, 1904, when defendants' solicitor wrote to plaintiff's solicitor that he must discontinue, or else that defendants would be obliged to move to dismiss.

No result seems to have been attained, and on 11th May, 1905, defendants' solicitor wrote again to same effect. Four days later he gave the usual notice of motion to dismiss, and on 31st May that motion was dismissed, on "plaintiff by his solicitor undertaking to go down to trial at the next non-jury sittings at Toronto."

Notwithstanding this the action still lay dormant until 19th June last, when defendants' solicitor again wrote to same effect as his letter of 11th May, 1905. To this apparently no reply was sent, and on 26th June another motion to dismiss was launched.

This was adjourned until after vacation and was argued on 25th September.

J. R. Roaf, for defendants.

G. H. Kilmer, for plaintiff.

THE MASTER:—Plaintiff was willing to have the action dismissed without costs. It was argued on his behalf that he was entitled to have his costs up to the time when defendants ceased to do business, though he was prepared to forego his strict rights. He relied on *Knickerbocker v. Ratz*, 16 P. R. 193, and on *Eastwood v. Henderson*, 17 P. R. 578, a case which was followed by the Exchequer Division in *O'Sullivan v. Donovan*, 8 O. W. R. 319. If this was always the view of plaintiff's solicitor, it must have been by an oversight that he gave the undertaking to proceed as a term of the dismissal of the motion in May, 1905. This seems otherwise inconsistent with the contention that plaintiff should now be allowed to discontinue without costs, on the ground that he has gained his object and that the action is at an end. The principle on which such an order can properly be made is exemplified in *Armstrong v. Armstrong*, 9 O. L. R. 14, 4 O. W. R. 223, 301. If it was thought that plaintiff was entitled to such an order, a motion should have been made to that effect when the order of 31st May, 1905, was made. I have no recollection now of what took place

then, or whether anything was said as to plaintiff's right to costs, or his being willing to forego them to have the action set at rest.

As the case now stands, before plaintiff can have the action dismissed without costs, it must be clear that plaintiff was justified in bringing the action; and that defendants acknowledged this by going out of business.

It was on grounds of this character that the cases relied on by plaintiff were decided.

Here, on the contrary, defendants by their affidavits positively deny the validity of plaintiff's patent. They say that they gave up business for reasons of their own and not on account of this action. They assert their right and intention to resume the use of the machinery in question whenever they see fit to do so.

This seems to bring the case within the decision in *Hunter v. Town of Strathroy*, 18 P. R. 127. There the Divisional Court held that there was no jurisdiction in Chambers to dispose summarily of the costs where the object of the action has not been substantially attained. Here the defendants deny that this has been done; and unless the parties can settle the matter otherwise, the plaintiff must now undertake peremptorily and without hope of any further indulgence to go to trial at the next non-jury sittings, and in default that the action be dismissed with costs.

The costs of this motion will be to defendants in any event.

CARTWRIGHT, MASTER.

OCTOBER 19TH, 1906.

CHAMBERS.

MONTGOMERY v. RYAN.

Summary Judgment—Rule 603—Suggested Defence—Bank—Account—Reference.

Motion by plaintiff for summary judgment under Rule 603 in an action on a promissory note given to the Bank of Montreal and assigned to plaintiff subject to its equities.

W. N. Ferguson, for plaintiff.

W. M. Hall, for defendant.

THE MASTER:—The note is admitted. The defences alleged are two. The first is that defendant gave collaterals which have not been fully and truly accounted for.

This would not entitle him to any greater relief than a judgment of reference to ascertain what exactly is due on the note in question.

The other defence is as follows, if I rightly understand the argument of defendant's counsel.

The bank, it is said, have no authority to do a savings bank business. This, it is argued, has the effect of locking up the circulation and preventing debtors from getting money to pay their liabilities. Even if such business is ultra vires, it does not appear how this can be any defence, unless a defendant could shew that he had funds in the savings bank which he was prevented by the rules from applying on the debt due by him to the bank. Nothing of the sort is even suggested here. It will be time enough to consider the question when any bank takes such a very unlikely position.

It must be left to a higher authority to give effect to such a defence if it is right to do so.

Something of this nature was set up in the recent case of Canada Permanent Mortgage Corporation v. Briggs, 7 O. W. R. 443. It did not however receive any consideration either at the trial or by the Divisional Court.

If defendant desires, he can have a judgment of reference. If not, the usual order will be made.

OCTOBER 19TH, 1906.

DIVISIONAL COURT.

TORONTO R. W. CO. v. CITY OF TORONTO.

Municipal Corporations—Expropriation of Land—Property of Street Railway Company Designed for Car Barn—Action to Restrain Council from Passing By-law—Declaratory Judgment—Refusal to Pronounce—Discretion—Appeal.

Appeal by plaintiffs from judgment of MEREDITH, C.J., ante 78.

W. Laidlaw, K.C., for plaintiffs.

H. L. Drayton and W. Johnston, for defendants

BOYD, C.:—The relief sought in this action is to restrain defendants from proceeding to expropriate property belonging to plaintiffs. . . . It is alleged . . . that the proceedings to expropriate are ultra vires because the land in question has been purchased or acquired under the terms of an agreement made with the defendants and incorporated in the statutory charter, 55 Vict. ch. 90 (O.)

The ground relied on is that the property is now held by plaintiffs for public or quasi-public use, and is necessary for the use and accommodation of the plaintiffs as a site for car-barns; and that expropriatory powers cannot be legally employed to divert this land from this necessary use as contemplated by the plaintiffs.

The question has resolved itself into a merely academic one, as the proposal to expropriate the land has not been prosecuted, and it may be enough for the purposes of the argument to say that there appears to be no incompatibility in the legitimate expropriation by defendants of land owned by plaintiffs, when that land is not essential to the purposes of the undertaking. That the land may be convenient for plaintiffs' purposes would not be, I conceive, an answer to the bona fide action of the defendants in employing their expropriatory powers.

Re Brown, 1 O. R. 415, relied on by defendants, does not support their contention in its absolute form; many expressions in it go to shew that quasi-public property may be the subject of expropriatory and paramount powers exercised by municipal corporations, in pursuance of a policy for bettering or improving the city or other municipality.

If plaintiffs obtained their property by the exercise of a power of expropriation, a graver question would arise if defendants sought afterwards to further expropriate for their uses property already expropriated by plaintiffs for their uses. There might arise in such case a conflict of paramount powers not contemplated by the Courts or the legislature; but no such difficulty exists when the contest is between a corporate body not possessed of compulsory

power of acquisition and a municipal body which does possess such powers in the way of expropriation.

The rule is recognized in American cases that land owned by a company whose business constitutes a public use, not in actual occupation or not essential to the undertaking, stands on the same footing as that of a private owner, and may be expropriated: see *Railroad Co. v. Belle River*, 48 Ohio St. R. 273, and *Y. v. P.*, 201 Pa. St. 457. Other cases are referred to and the matter is discussed in 15 Cyc. Law and Practice, pp. 612 et seq.

I agree with the ground of decision below, that this is not a case for a declaratory judgment.

Appeal dismissed with costs.

MAGEE, J.:— . . . The claim for an injunction was practically abandoned, and merely a declaratory judgment asked for. In the absence of danger involving the actual relief sought by the writ, I do not see that the company are any better entitled to an abstract declaration, which may never be required, that the city could not expropriate, than the city would be to ask one that it could do so if it so desired: *Stewart v. Guibord*, 6 O. L. R. 262, 2 O. W. R. 168, 554; *Bunnell v. Gordon*, 20 O. R. 281; *Barraclough v. Brown*, [1897] A. C. 615; *North-East Marine Co. v. Leeds Forge Co.*, [1906] 1 Ch. 324; *Offin v. Rochford Council*, ib. 342. . . .

Appeal dismissed with costs.

MABEE, J.:—The Court has undoubted authority to grant a declaratory judgment without incidental relief. The cases, however, shew that this is a discretionary power: *Bunnell v. Gordon*, 20 O. R. 281; *Thomson v. Cushing*, 30 O. R. 123. The Chief Justice, in the judgment in appeal, deals very fully with the facts and exercises the discretion of the Court in refusing the declaration asked for. I cannot say that he was in error in the exercise of such discretion, and the appeal, in my opinion, fails upon that ground alone. I say nothing as to the powers of defendants to expropriate the lands in question.

OCTOBER 19TH, 1906.

DIVISIONAL COURT.

HAMMILL v. GRAND TRUNK R. W. CO. AND CITY
OF HAMILTON.

*Negligence — Municipal Corporation—Coal Yard—Railway
Siding—Injury to Yardsman—Construction of Wall—
Evidence—Findings of Jury—Nonsuit.*

Appeal by defendants the corporation of the city of Hamilton from the judgment of MAGEE, J., in favour of plaintiff, the widow and administratrix of the estate of John Hammill, deceased, for the recovery of \$1,000 damages for the death of her husband by the alleged negligence of defendants.

Wallace Nesbitt, K.C., for appellants.

S. F. Washington, K.C., for plaintiff.

The judgment of the Court (FALCONBRIDGE, C.J., MAGEE, J., CLUTE, J.), was delivered by

CLUTE, J.:—The action is brought under Lord Campbell's Act, by the widow and administratrix, claiming damages for the death of John Hamill, who was killed by being crushed between a car of the Grand Trunk Railway and a stone wall erected by the city of Hamilton.

On application of plaintiff the action was dismissed as against the Grand Trunk Railway Company.

The corporation of the city of Hamilton have a city yard into which there runs a switch from the Grand Trunk Railway, passing the coal shed on the curve. On the opposite and concave side of the track the city erected a stone wall some 8 days before the accident. Plaintiff alleges that this wall was negligently built, and that it was placed "so close to the track that it was a trap for brakemen or others who required to place cars in the city's said yard."

On 4th July, 1905, the deceased had been ordered by the yardmaster of the Grand Trunk Railway (who had been requested by the city to do so) to place a car in the city's

yard. The statement of claim then states that the deceased was at the westerly side of the track and was walking in a southerly direction as the cars were slowly backing in, and while so walking back in the yard he was caught between the side of the car and the said fence, which was a space of about ten inches, and received injuries from which he died a few days later.

The city engineer states that the wall in question was made under his instructions. It is 72 feet long. The distance between the stone wall and the gauge of the rail is 3 feet 5½ inches at the northerly end and 3 feet 3½ inches at the southerly end. On the other side it is 5 feet. The width between the rails is 5 feet 2 inches. The width of the car is 9 feet 11½ inches, leaving a space of 10 inches between the car and the stone wall. It is stated by . . . one of plaintiff's witnesses that the space between the track and the stone wall is wider at the gate than it is further up the siding, but he did not measure it. Some emphasis was laid upon this point by plaintiff's counsel, but the difference in width, as appears from the plan and from the evidence of the city engineer, is only 2 inches. The evidence is not very clear as to how the accident really occurred. The deceased was "placing" the car, that is, putting the car opposite to the coal-shed where it was wanted, so that coal could be taken out of the car into the shed. It is said that he would walk along until the car door was opposite wherever it was wanted, giving the signal to the engine-driver; and that is what he was doing at the time of the accident. It is further stated that it was necessary for him to walk upon the side where the wall is, as the shed upon the opposite side is built so near the track that there was not room for him to walk on that side, and also because the shed side being the convex side of the track, he could not signal to the engine-driver, who was on the engine at the rear pushing the cars to the place desired. What must have occurred would seem to be this: that as the car was being pushed in, the deceased was in front of it, and when the car had reached about the spot where it was desired to have it placed, he stepped to the side of the track to signal, without apparently noticing the wall, and, the car being in motion, he was immediately caught between the wall and the car, and received the injuries of which he died. It is said that he was a very careful yardsman; had

been in the employ of the Grand Trunk Railway Company for some 18 years; that he had frequently placed cars in this shed before the wall was built, but that he had not had occasion to place a car where this was required since the wall was built. The accident happened about 11 o'clock in the morning. The space occupied by the wall previous to its erection had been open ground, and upon this ground just back of where the wall stood the deceased had been in the habit of signalling the engine-driver when placing cars.

Plaintiff's witness McConnell, who was the engine-driver at the time the accident occurred, says: "We pushed cars ahead of us. We had to push cars in to place them. We pushed in every car that was placed in that siding. Hammill (the deceased), who was in front, was giving the signal as he went along at the side of the car to place it. I could not see Hammill, but he was walking on the ground alongside of the car as the car was going in." . . .

The engine-driver then received a signal from Wadsworth to stop and back, and it was then found that the deceased had been crushed between the car and the wall. Wadsworth, who had left Canada, was not called. . . .

For the defence it was shewn that there was nothing unusual about the construction of the wall; that the distance between the rail and the wall is about the average of loading platforms; that these switches and loading platforms are constructed so that persons handling material could get it unloaded quickly, and if cramped for space the platform is closely crowded, leaving sufficient clearance for the width of the car that will go through it; that this wall or platform was used for unloading bricks and lumber on the one side and coal on the other. It is described as a stone retaining wall (to retain the earth of the dock) 2 feet wide and 70 feet long and about 3 feet 6 inches above the top of the rail. The earth is filled in behind this wall, forming a dock for unloading materials of all kinds of freight, principally brick.

The witness Laflin, an engineer on the Toronto, Hamilton, and Buffalo Railway, stated that these receiving platforms are not constructed with any idea that a brakeman or anybody else should ever get between these platforms and the rails; that the primary reason for putting the plat-

form so close to the rails was for facilitating the unloading of material.

A number of witnesses swore that it was unnecessary to stand where the deceased was when he was injured in order to place the car; that this might have been done either from the wall or the top of the car. One witness states that after the wall was built there were some 13 or 14 cars put in, and Hammill (the deceased) came ahead of the cars and stood in the open space and signalled to his brakeman. Another witness, Morgan, in the employ of the city, who had charge of receiving the coal deliveries, and who asked Hammill on this occasion to put these cars in the switch, said that he had had a great many cars put in, probably 150; that there were from 15 to 20 cars put in after the wall was built; and that Hammill's custom was to go ahead of the cars, that he never saw him at the side of the car.

On the evidence the following are undisputed facts: that the wall in question was built upon the city's land for the purpose of a receiving platform; that it was properly placed, constructed, and used for that purpose; that the deceased had full knowledge of its position, and had on previous occasions placed cars in the yard, after the wall was built; that on the occasion in question he proceeded in front of the car, and, the car having reached the place where he desired to have it placed, stepped aside, and was caught by the moving car between it and the wall.

I have searched the evidence in vain to find some duty which the city owed to the deceased which should have restrained them from placing the wall where it was placed. It was intended to be used as a receiving platform; and for conveniently handling goods it was properly placed. For the city to have assumed that by so placing it some employee of the Grand Trunk Railway Company in placing cars would stand between the car and the platform, seems to me wholly unreasonable. But, supposing the defendants could so have anticipated the accident, it could only be upon the ground of assuming that an employee would recklessly and carelessly place himself in a position where he was sure to be injured. Even supposing that the wall were not placed as a receiving wall, but to be used as a fence, had not the city a right to use that land as they pleased? Suppos-

ing the land had been owned by a stranger, could it be pretended for a moment that he would not have had the right to build up to the line, and does it make any difference that the city happened to own the lands upon both sides of the track? I think not. There was no duty to leave a way for the yardsmen upon the opposite side of the track from which to signal the engine-driver where to stop, and it seems to me wholly gratuitous to say that there was any such necessity. There was then, I think, no negligence whatever on the part of the city in erecting the platform in the manner they did.

But, assuming that the city, having knowledge of the usual practice of the yardsmen in placing cars and in so doing of occupying the land where the wall stands for the purpose of signalling the engine-driver, negligently placed the wall where it is so as to endanger the yardsmen when placing cars, deceased might have taken another method of signalling the engine-driver. He chose to place himself in a position of danger, with a knowledge of the facts, where injury was inevitable. He was the cause of his own injury. He stepped in the way of danger needlessly and thoughtlessly, and that was the immediate cause of the injuries which he received.

I think the judgment entered for plaintiff should be set aside with costs and the action dismissed with costs.

THE
ONTARIO WEEKLY REPORTER

(TO AND INCLUDING OCTOBER 27TH, 1906).

VOL. VIII. TORONTO, NOVEMBER 1, 1906. No. 14

CARTWRIGHT, MASTER.

OCTOBER 22ND, 1906.

CHAMBERS.

ANDERSON v. NOBELS EXPLOSIVE CO.

Writ of Summons—Service out of Jurisdiction—Cause of Action—Rule 162 (e)—Tort Committed in Ontario—Injury to Plaintiff by Defective Fuse Supplied to his Employers by Defendants in Foreign Country.

Motion by defendants to set aside an order obtained by plaintiff allowing service upon the defendants at Glasgow, Scotland, of the writ of summons and statement of claim, and to set aside the writ and the statement of claim and the service thereof effected upon defendants.

W. H. Blake, K.C., for defendants.

T. N. Phelan, for plaintiff.

THE MASTER:—The statement of claim alleges: (1) that plaintiff is a labourer, and resides at Byng Inlet, in the province of Ontario, and that defendants carry on business and have their head office at Glasgow, in Scotland; (2) that plaintiff in February last was employed by the James Bay Railway Company in blasting in Ontario, and that the fuse used was manufactured and sold by defendants; (3) that while plaintiff was so engaged there was a premature explosion, through the fuse being defective, which severely injured plaintiff, causing him to lose one of his eyes; (4) that defendants were negligent in allowing the fuse to be manufactured and sold in a defective condition, the negligence being that there was a space left in the fuse in which

there was no powder, and consequently the fuse, which was trimmed to burn a foot a minute, caused the explosion prematurely; and (5) plaintiff claimed \$5,000 damages. . . .

It was admitted that if the order can be sustained, it must be under the last clause of Rule 162 (e), which allows service to be made on a foreign defendant when the action is founded on a tort committed within this province. There is no such provision in the corresponding English Rule, nor, so far as I am aware, is there any similar procedure in the United States.

The question, therefore, to be decided, is important and not free from difficulty. Apparently now for the first time the point arises in our Courts, does the statement of claim disclose any tort committed by defendants in Ontario?

Mr. Phelan, with much ingenuity and vigour, contended that this action would lie. He conceded that a tort was "the infringement of some absolute right to which another is entitled." Underhill on Torts, Canadian ed., p. 7; Addison on Torts, 7th Eng. ed., p. 1. He then argued that such a right was always localized, whether such right exists in respect of a man's property or of his character; and that in respect of his bodily welfare it necessarily went with him, and so that wherever he was injured, there a tort was committed, if such injury was the result of the wrongful act of another. And in this case he submitted that plaintiff having been, as alleged, seriously injured by the defective fuse of defendants' manufacture, there had been a tort committed by them within Ontario which enabled him to bring this action. . . .

[Reference to *Thomas v. Winchester*, 6 N. Y. 397; *Pollock on Torts*, 6th ed., p. 487 n., 488; *Dixon v. Bell*, 5 M. & S. 198; *Langridge v. Levy*, 2 M. & W. 519, 4 M. & W. 337; *Francis v. Cockrell*, L. R. 5 Q. B. 184, 501; *Earl v. Lubbock*, [1904] 1 K. B. 253, 74 L. J. N. S. K. B. 121; *Heaven v. Pender*, 11 Q. B. D. 503, 517; *Winterbottom v. Wright*, 10 M. & W. 109, 62 R. R. 534.]

There is no doubt that the statement of claim alleges an injury suffered by plaintiff in Ontario. But before he can sustain an action for a tort committed by defendants in Ontario, he must shew that defendants owed him as a duty, which they did not fulfil, to send out only perfect fuses, and that as a result of this he was injured. As I under-

stand the cases, no such duty exists, and therefore the order should not have been made, and must now be set aside and the action dismissed, and with costs if defendants think it worth while to ask for them.

MABEE, J.

OCTOBER 22ND, 1906.

CHAMBERS.

REX v. TORONTO R. W. CO.

Criminal Law—Indictment of Electric Railway Company—Nuisance—Endangering Safety of Public—Removal from Sessions into High Court—Difficult Questions of Law—Delay of Trial.

Motion by defendants to remove an indictment of defendants for a nuisance from the York General Sessions into the High Court.

H. H. Dewart, K.C., and D. L. McCarthy, for defendants.

H. L. Drayton, for the Crown.

MABEE, J.:—The affidavit upon which the motion is made sets forth that nice and intricate questions of law will arise upon the trial; and, from the discussion of the case before me, it was apparent, I think, that such will be the case. It is not needful that those questions be anticipated or any expression of opinion made with reference to them; it is sufficient that the Court is satisfied that they exist: Short and Mellor's Practice, p. 96.

In the car fender case, *Rex v. Toronto R. W. Co.*, 4 O. W. R. 277, the Court made an order similar to that asked here.

No reason was suggested by counsel for the Crown why the case should not be tried in the High Court; it can be tried at the Assizes some two months earlier than at the Sessions, and, if the alleged nuisance endangers public safety, as is alleged, it is desirable that there should be no delay in having the facts investigated.

The order may go as asked for the removal of the proceedings into the High Court.

MABEE, J.

OCTOBER 22ND, 1906.

WEEKLY COURT.

RE FARRELL.

Will — Construction — Residuary Clause — Enumeration of Articles—Ejusdem Generis Rule—Construction to Include Subject of Lapsed Devise.

Motion by the executors of the will of Denis Farrell, deceased, for order declaring construction of will.

A. H. Clarke, K.C., for applicants.

F. W. Harcourt, for infants.

MABEE, J.:—One clause of the will of the testator is as follows: "I give, devise and bequeath all my real and personal estate, . . . in the manner following, etc. One of the clauses which followed provided that a sister should have certain lands owned by the testator, which devise has lapsed.

The last clause is as follows: "All the rest and residue of my estate, consisting of money, promissory note or notes, vehicles, and implements, I give and bequeath to my brother Andrew," etc.; and the Court is asked to say whether Andrew is entitled under the residuary clause to the lapsed devise.

Timewell v. Perkins, 2 Atk. 102, is an authority that general words will be cut down to articles ejusdem generis, not merely where the general words follow the articles, but when they precede it, provided it appears clearly that the enumeration of the articles is intended to be explanatory of the general words, and not merely to shew the extent of the gift. . . .

[Reference to Gower v. Davis, 29 Beav. 222; Mason v. Ogden, [1903] A. C. 1; King v. George, 4 Ch. D. 435, 5 Ch. D. 627.]

These cases follow the old case of Bridges v. Bridges, 8 Viner's Abr. 295.

Whether Timewell v. Perkins may be regarded as overruled or not, it certainly has not been followed in many of the later cases: Theobald, 5th ed., p. 205.

I think in the present case this will may be construed to prevent an intestacy as to the lapsed devise, and that the lands given to the deceased sister pass to Andrew.

The cases upon this question are numerous, and among others cited upon the argument were the following, some of them bearing also upon the use of the word "estate" and the words "give and bequeath" instead of the word "devise:" *Crombie v. Cooper*, 22 Gr. 267, 24 Gr. 470; *McCabe v. McCabe*, 22 U. C. R. 378; *Stein v. Ruthdon*, 37 L. J. Ch. 369; *Patterson v. Hoddert*, 17 Beav. 210; *Hamilton v. Hodson*, 6 Moo. P. C. 76; *Re Kendall*, 14 Beav. 608.

The costs of all parties should be paid out of the estate; those of the executors will be solicitor and client costs.

TEETZEL, J.

OCTOBER 22ND, 1906.

WEEKLY COURT.

DAVIES v. SOVEREIGN BANK AND CITY OF
TORONTO.

Discovery — Examination of Officer of Defendant Municipal Corporation — Alderman of City—Rule 439 (a).1 — Construction of—" Officer or Servant"—Legislative Functions.

Motion by plaintiff to commit John Noble, an alderman of the city of Toronto, who refused to be sworn on an appointment taken out by plaintiff for his examination for discovery as an officer or servant of the corporation, under Rule 439a (1).

F. Arnoldi, K.C., for plaintiff.

F. R. Mackelcan, for defendants the city corporation and for John Noble.

TEETZEL, J.:—The motion involves the question whether a member of the municipal council other than the mayor or other head of the corporation is examinable under this Rule, which reads: "439a (1). In the case of a corporation any officer or servant of such corporation may, without order, be orally examined before the trial touching the matters in

question by any party adverse in interest to the corporation, and may be compelled to attend and testify in the same manner and upon the same terms and subject to the same rules of examination as a witness except as hereinafter provided; but such examination shall not be used as evidence at the trial."

The prior Rule made provision for the examination of "one of the officers" of the corporation, and though many decisions arose on the question whether certain persons were officers or merely servants of corporations, the question of the right to examine a member of a municipal council as an officer of a corporation never seems to have received judicial consideration.

The Rule received very liberal interpretation, and many persons who were alleged to be servants only were held to be examinable as officers.

The object of the Rule being to discover the truth in relation to the matters in question, the trend of the decisions was that the examination ought to be of such officers as are best able to give information respecting such matters, and it frequently occurring that an employee occupying no official position in the popular sense knew much more about the important facts of the case than any officer, the Rule was amended to embrace "any officer or servant."

While aldermen, as members of the municipal council, are in one sense officers of the corporation, I do not think the framers of the Rule intended to include them in the expression "officer or servant of such corporation." They are merely legislative officers of the corporation, and with the exception of the mayor or other head (who is by sec. 279 of the Municipal Act declared to be the "chief executive officer of the corporation") no individual executive or ministerial duties are imposed upon them. They are not employed by, nor are they in any way under the control of, the corporation while in office. They have no authority to act for the corporation, except in conjunction with other persons constituting a quorum.

The Municipal Act itself draws a sharp distinction between members of council and officers of the corporation.

[Reference to secs. 6, 315, 326, 327, 328, and also to Parts II. and V., of the Municipal Act.]

From the association in the Rule of the words "officer or servant," I think the inference is against the word "officer" being intended to extend to persons who are merely legislative officers, and that the true intention was to embrace as officers of a municipal corporation only persons who are such in the usual sense of that word, namely, persons under the control of the corporation and intrusted or employed to administer its affairs, or persons whose duty it is to execute the will of its legislative body.

The rule of construction applicable is that when two or more words of analogous meaning are coupled together they are understood to be used in their cognate sense, express the same relations, and give colour and expression to each other: see Maxwell on Statutes, 4th ed., p. 491. Or, as stated by Lord Bacon, "the coupling of words together shews that they are to be understood in the same sense:" † Bacon's Works, p. 26.

Motion dismissed with costs.

ANGLIN, J.

OCTOBER 23RD, 1906.

CHAMBERS.

PEPPER v. OTTAWA TYPOGRAPHICAL UNION
NO. 102.

*Writ of Summons—Service on President of Trade Union—
Effect of Registration of Union under Ontario Insurance
Act—Body Corporate—Party to Action.*

Appeal by defendants from order of Master in Chambers, ante 409, dismissing their motion to set aside service of a copy of the writ of summons on their president for them.

J. G. O'Donoghue, for appellants.

J. R. Code, for plaintiff.

ANGLIN, J., dismissed the appeal with costs.

ANGLIN, J.

OCTOBER 23RD, 1906.

CHAMBERS.

MITCHELL v. HAGERSVILLE CONTRACTING CO.

Venue — Change — Preponderance of Convenience — Witnesses—Expense—Other Considerations.

Appeal by defendants from order of Master in Chambers, ante 410, dismissing their motion to change the venue from Welland to Cayuga.

C. J. Holman, K.C., for defendants.

R. McKay, for plaintiff.

ANGLIN, J., dismissed the appeal with costs to plaintiff in the cause.

BRITTON, J.

OCTOBER 23RD, 1906.

TRIAL.

WILSON v. BEDSON.

Executors and Administrators — Action by Physician against Executrix of Deceased Patient—Remuneration for Professional Services — Account — Evidence — Corroboration — Costs.

Action against the executrix of the will of Sarah White, deceased, to recover the value of professional services rendered by plaintiff to deceased.

J. A. Ferguson, for plaintiff.

Z. Gallagher, for defendant.

BRITTON, J.:—Plaintiff was for a long time the family physician of Sarah White and of her husband.

The present action is for the balance of an account for services from 3rd December, 1898. The account as rendered is a large one, as plaintiff continued to attend Mrs.

White down to the date of her death, viz., 23rd July, 1903. Apparently Mrs. White was fond of money and slow pay. She thought a good deal of plaintiff, and often when not seriously ill desired his attendance, even when a physician could do little or nothing for her. She was a woman of strong will, and insisted upon having medical attendance. Plaintiff gave up his time and was obedient to her call, so he has the right to be paid what is reasonable for his time and attendance. It is often more difficult to deal with imaginary ills and nervous trouble than with wounds or fractures or diseases of bodily organs. Plaintiff gave a very clear statement of what services he rendered, and, although he has not been as careful in his book-keeping as perhaps he will be in future, he has established an indebtedness, and there has been ample corroboration in general support of plaintiff's own evidence. This corroboration is given by defendant herself and by witnesses. I have looked at the books of plaintiff to which he referred to refresh his memory, and at certain entries on which defendant relies in opposition to certain charges. Wherever entries either as to visits or amount charged have not supported items in the accounts rendered, I have disallowed the charges. Plaintiff apparently quite assented to this being done. Apart from certain entries and from a general feature of the last account, to which I will refer later, the only difficulty in the case was that presented by the evidence of Mary Anderson. She seemed most positive that there is error in the accounts to a considerable amount, and particularly as to the alleged attendances in April, 1901, and in April, 1903. This witness is a very intelligent woman, and is possessed of a good memory, but, unless she is a person of an altogether phenomenal memory, it is impossible that she should be able now, as a mere matter of memory, without having made any note of plaintiff's visits, to tell the days and number of plaintiff's visits in certain months of the years 1901 and 1903. That, however, is quite different from some important general evidence which she gave, and which, to some extent, I accept. The greatest conflict is as to April, 1903. Plaintiff charges for 48 visits in that month. The witness says plaintiff did not make one visit in that month. Plaintiff cannot be mistaken as to all those visits; the witness may be mistaken. There is nothing to warrant the conclusion that there is any wilful misrepresentation on this point.

I find that there was an indebtedness to plaintiff on 1st January, 1901, of \$234, not \$254, for which amount the note was given. The difference is by the omission of plaintiff to credit \$20 paid on 21st October, 1899.

The accounts then to 1st January, 1900, would stand as follows:

Account rendered from 3rd Dec., 1898, to 30th April, 1899.....	\$146
Account rendered from 30th April, 1899, to 5th Sept., 1899	57
Account rendered from 1st Nov., 1899, to 16th Oct., 1900	111
	<hr/>
	\$314
Less paid: 5th Sept., 1899.....	\$30
21st Oct., 1899	20
16th Oct., 1900	30
	<hr/>
	80
	<hr/>
	\$234

Note should have been for \$234.

I find the account for services in February and March, 1901, amounting to \$31, proved. This I call account No. 1.

The account rendered from 1st April, 1901, to 7th January, 1902, amounted to \$147, from which I deduct \$18 not proved, and allow \$129. This account I call No. 2.

The account from 4th March, 1903, to 23rd July, 1903, inclusive, as rendered, amounted to \$395. From this I think there should be deducted \$174, leaving \$221, which amount should be allowed.

I arrive at my conclusion in reference to this deduction, by reason of what is found in the entries in plaintiff's books, and upon the evidence of Miss Anderson, and further because I am of opinion that in the case of a patient in the so-long continued condition of the deceased, Sarah White, the estate ought not, unless upon more evidence than was before me, to be liable for such a large number of visits from 1st May to 23rd July at the maximum charge. No injustice will be done to plaintiff by this deduction. I am fully confirmed in my opinion by the careful estimate of the witness Mary Anderson, made evidence by plaintiff's putting

it in on the trial, in which she states that plaintiff should deduct \$250 from his account of \$543. My deductions from the \$543 amount to only \$192. . . .

Plaintiff must get costs.

This is a case which, under the circumstances, defendant, representing the estate, was quite right in defending. She was not in a position to know what amount to pay into Court. Without having any jurisdiction, I can only express the opinion that she should be entitled to charge the costs, not only what she must pay plaintiff, but her costs of defence, against the estate of Sarah White.

Judgment for plaintiff against defendant as executrix, and payable out of the estate, for \$448.62 with costs.

CARTWRIGHT, MASTER.

OCTOBER 25TH, 1906.

CHAMBERS.

SHEARD v. MENGE.

Dismissal of Action—Want of Prosecution—Cause of Action—Abatement—No Question but that of Costs Remaining.

Motion by defendant to dismiss action for want of prosecution.

J. P. Eastwood, for defendant.

E. W. J. Owens, for plaintiff.

THE MASTER:—This action is for an injunction and damages in respect of injuries alleged to have been caused to plaintiff's land by a drain, for which defendant was alleged to be responsible.

It came on for trial on 17th and 18th September, 1901, before the Chancellor. Judgment was reserved, and on 25th October, 1901, he directed plaintiff to amend so as to have all owners interested in the drain in question brought before the Court, and reserved "costs already incurred to be disposed of by the trial Judge."

Since that time nothing has been done. In the meantime plaintiff has parted with his interest in his land, and defendant has lost his land by foreclosure.

On 25th May, 1906, defendant served notice of this motion . . . It was argued on 7th June Judgment was reserved to enable the parties to apply to the Chancellor for a disposition of the costs of the action, which it is admitted is now useless, there being nothing but these costs to be dealt with. The parties accordingly appeared before him a day or two ago, when the Chancellor thought it better that this motion should first be disposed of.

It was suggested at this stage that the action has abated, and therefore no order can be made. This, however, does not seem to me to be correct. The action is for wrongs alleged to have been committed (as they necessarily must have been, if committed at all) before its commencement. Both plaintiff and defendant are still alive; and the fact that both have ceased to be interested in the lands in question does not, in my understanding of the term, cause an abatement. The parties are both amenable to the jurisdiction of the Court, and the question still remains undecided whether plaintiff had any cause of action against defendant. Neither the rights nor liabilities of either party arising from the alleged wrongful acts of defendant would pass to their successors in title by transmission of interest in the land. If this could be done it would open a new and easy way for either party to escape from the burden of a possible heavy litigation.

In . . . *Holdsworth v. Gaunt*, ante 428, a similar motion was made under facts not widely different. And I think that the order that was made there is the one that should be made in this case, which seems to be ruled by *Hunter v. Town of Strathroy*, 18 P. R. 127, the latest decision I have been able to find bearing on the point.

Unless the parties can settle the matter otherwise, plaintiff must undertake peremptorily, and without looking for any further indulgence, to proceed with the action with all possible diligence, and in default the action must be dismissed with costs, except those of the trial of September, 1901, which will be dealt with by the Chancellor.

Plaintiff must elect within a week whether he will proceed or have his action dismissed with costs as above. If he chooses the first alternative, the costs of this motion will be in the cause only. There is no proof here of any

such steps having been taken here by defendant to have the matter closed as were shewn to have been taken in *Holds-worth v. Gaunt*, supra.

ANGLIN, J.

OCTOBER 25TH, 1906.

WEEKLY COURT.

RE KERR AND TOWN OF THORNBURY.

Municipal Corporations—By-law for Raising Money to Construct Sidewalks—Submission to Electors—Failure to Comply with sec. 342 of Municipal Act—Appointment of Scrutineers—Date of Issue of Debentures—Date of Payment—Quashing By-law—Costs.

Motion by William Kerr to quash a by-law of the town of Thornbury authorizing the raising by way of loan of the sum of \$5,000 to construct cement sidewalks in the town, on the ground that the by-law (which required the assent of the electors) was not legally and properly submitted to the electors and was not approved by them, and on other grounds.

J. S. Lundy, for the applicant.

T. H. Dyre, Thornbury, for the town corporation.

ANGLIN, J.:—I reserved judgment over night for the purpose of ascertaining accurately from the members of the Divisional Court, or one of them, which disposed of the case of *Re Bell and Township of Elma* this week, what was the exact ground of decision in that case. I have ascertained from the Chief Justice of the King's Bench that the ground of decision was that the provisions of sec. 341 of the Municipal Act are imperative, and that an omission in a by-law, to which that section applies, to fix a time and place for the appointment of persons to attend the various polling places and at the final summing up of the votes by the clerk, is fatal.

In this case that provision was complied with, but, although the by-law fixed the time and place, the officer to whom that duty was intrusted, the mayor of Thornbury, neglected and failed to attend, and consequently the provisions of sec. 342 were not complied with.

If failure to comply with the provisions of sec. 341 would be fatal, then I think failure to comply with the provisions of sec. 342 must also be fatal. It prevents persons attending as scrutineers for the polling and the final counting up. On this ground, therefore, I think the by-law must be quashed.

There is also another objection which was taken. The by-law provides a date for the issue of the debentures, and provides for payment of the last of these debentures at a date more than 20 years after their issue. That objection is fatal. That objection was not taken upon the notice, and if the by-law had been quashed upon that ground only, I would not have given costs; but the first objection was taken, and is sufficient. The other objections taken are not allowed.

The costs will be limited to the objections which have been taken successfully, and the costs of affidavits supporting objections which have not been given effect to will not be allowed.

ANGLIN, J.

OCTOBER 25TH, 1906.

WEEKLY COURT.

MUNRO v. SMITH.

MACKIE v. SMITH.

RICHARDSON v. SMITH.

Mines and Minerals—Ontario Mines Act, 1906—Claims for Mining Locations—Duty of Mining Recorder to Record—Applications for Mandamus—Ministerial Act—Result of Failure to Record—Rights of Applicants—Previous Adverse Claims Undisposed of—Bar to Recording Fresh Claims—Affidavit—Form—Appeal to Mining Commissioner—Judicial Functions of Recorder—Concurrent Jurisdiction of Mining Commissioner to Grant Mandamus—Powers of High Court—Merits—Discretion—Intituling Proceedings in Court—Costs.

Motion by plaintiffs for orders of mandamus requiring the mining recorder of the Temiskaming mining division,

defendant George T. Smith, to accept and record the claims of plaintiffs for mining locations.

J. Bicknell, K.C., for plaintiffs.

G. T. Blackstock, K.C., for defendants the Temiskaming Mining Co.

J. A. Macintosh, for defendant Ganz.

W. D. McPherson, for defendant Smith.

Grayson Smith, for defendant Cartwright.

ANGLIN, J.:—The first question to be considered is, whether the duty of recording is judicial or ministerial. If the duty be judicial, the remedy of mandamus would probably not lie. The duty is, in my opinion, purely ministerial.

Section 51 of the Mines Act of Ontario, 1906, provides for the appointment of this officer in these terms: “. . . who shall be an officer of the Bureau of Mines to receive and record applications for mining lands in the respective divisions, and to carry out the provisions of this Act as prescribed.”

Section 58 requires the mining recorder “to forthwith enter in the proper book in his office the particulars of every application for a claim presented by a licensee, and to file such application, sketch, or plan in his office.”

Section 59 requires an applicant, when seeking to record a claim, to produce his license, and requires the mining recorder to indorse upon such license a note of the record made.

There is nothing in these sections requiring anything like the exercise of judicial functions. The recorder has to be satisfied, as every ministerial officer has to be satisfied, that everything has been done which is prescribed as pre-requisite to recording, and upon that being done he discharges his functions, in the ordinary course, much as a registrar of deeds does.

But it is urged on behalf of the respondents upon these applications that, though the duties be ministerial, mandamus should not be granted.

In the first place it is argued that no harm will result from the failure to record; that no right is acquired by a

person making application; and, consequently, that he has no status to ask that any right should be given effect to.

As to no harm resulting from the failure to record, sec. 156, it seems to me, affords a complete answer. The failure to record within 15 days after staking out may have and probably would have the effect of depriving a person who has staked out, if his staking out is upon a first discovery, and is otherwise valid, of the rights which, in other circumstances, such staking out would have conferred upon him.

It is true that no right, that is, no interest, in the land is acquired by the application to record a claim; but it does not by any means follow that the applicant has not rights which are affected by refusal to record the claim, if the claim be a valid one. He has, I think, such rights, and I think these rights are injuriously affected. . . . or may be so affected.

Then it is said that, upon the proper construction of the statute, only one mining claim can be of record at a time, and that until the first mining claim recorded is disposed of, no other claim may be recorded in respect of the same portion of territory.

This argument depends upon sec. 157 of the statute, which requires the applicant for record to make an affidavit stating, amongst other things, that the "deponent has no knowledge and has never heard of any adverse claim by reason of prior discovery or otherwise." This section proceeds to state that the affidavit may be made upon form No. 14. Glancing at form No. 14, it seems clear that the section cannot have been intended to have put upon it the construction which its very terms might warrant, because clause 2 of form No. 14 reads as follows: "That I have no knowledge of and have never heard of any adverse claim to the said mining claim, except as follows." Now, if there can be any exception, and if the form contemplated that there may be an exception, it seems to follow that sec. 157 cannot have been intended, if form No. 14 is to be looked at in connection with the construction of it, to debar every bona fide claimant who has any knowledge of any adverse claim, valid or invalid, recorded or unrecorded, staked out or not staked out.

It seems to me that the true construction of sec. 157 is that the applicant is required to make disclosure of any

adverse claim, especially of any such claim unrecorded, so that the recorder may have knowledge thereof and give notice to persons having such adverse claims, under sec. 158, since he gives effect to the application in 60 days if no adverse claim or dispute note is lodged: sec. 58.

Were the contention that no claim can be recorded while a prior recorded claim is awaiting disposition, sound, a first discoverer who had duly staked out his claim, but delayed a few days in recording it, might find himself cut out by some unscrupulous adventurer whose conscience did not balk at a cast iron affidavit in the very terms of sec. 157, and who had thus succeeded in recording a claim. The real discoverer would thus find himself precluded from recording his claim, though the 15 days had not expired, and, unless the fraudulent claim of the adventurer should be disposed of with a diligence scarcely to be expected, would lose the benefit of his staking, because unable to record his claim within the 15 days prescribed by sec. 156.

To state this possible case seems to me sufficient to make it clear beyond all doubt that such was not the intention of the legislature, and that such cannot be the nullifying effect of sec. 157 upon the explicit language of sec. 58. Were it so, this Act would be a formidable weapon in the hands of fraudulent and dishonest prospectors.

From secs. 60 and 62 it seems to me quite apparent that the judicial functions of the mining recorder only commence after a claim has been recorded, in respect of that claim, and that they do not commence until record has been made. Until that time the mining recorder is not required to deal with a claim in any judicial capacity, but merely as a ministerial officer who is compelled to record it, under the sweeping terms of sec. 58, which seem to admit of no exception.

From the judicial functions which he discharges, under the jurisdiction conferred by secs. 52 and 60, provision is made for appeal to the mining commissioner; and, it seems to me, that right of appeal is clearly limited to decisions in the discharge of those judicial functions, and does not at all apply to a refusal on the part of the mining recorder to record a claim, of which no record is made, and for appeal from which no machinery seems to be provided.

Then it was also argued that mandamus should not be granted because power is conferred by this very Act (sec.

9 (f)) upon the mining commissioner, who is by sec. 8 of this statute made an officer of the High Court, to grant mandamus and injunction in all proceedings where the same are, or are deemed by him to be, requisite for the granting of relief in any matter in which jurisdiction is given by this Mines Act.

It may be and probably is the case that concurrent jurisdiction is conferred by this Act upon the mining commissioner, but it is very obvious that such an application to the mining commissioner would afford no relief in this case, because it is stated on behalf of the mining recorder that the reason he had refused to record these claims was that he had been instructed by the mining commissioner that, in his opinion, these claims should not be recorded until the claims were disposed of. It therefore appears to be as much the refusal of the mining commissioner as that of the mining recorder. Therefore, to ask the applicants to apply to the mining commissioner would appear to be to ask him to appeal from the mining commissioner to the mining commissioner himself.

It by no means follows that the ordinary jurisdiction of the Courts to grant mandamus is ousted. I do not read that section as at all meaning that a person having rights entitling him to injunction or mandamus, by reason of the failure of some officer to comply with the provisions of the Act, must resort to the mining commissioner for relief. He may come to the Court, and, if he makes out a proper case, have that relief granted. Here he has made out such a case.

I do not say anything about the merits. There is a great deal upon the merits which might lead one to refuse the application, if discretion might be exercised. I speak now more particularly of the case of Munro. All these matters can be disposed of by the mining recorder when he deals with the claims when they are recorded, and when the mining recorder may deal with them, as he must, judicially.

Upon the face of the proceedings I find that they have been intitled "Pursuant to the Mines Act, 1906," as well as in the High Court of Justice. Such a caption on proceedings in this Court is wholly unwarranted. The Act provides that those words shall be placed at the head of all documents brought before the mining commissioner.

Before any order is issued upon the present applications, I must require the solicitors for the applicants in the various actions to amend their proceedings by removing these words, not only from the writs of summons but from all affidavits in these matters, which are on file in this Court. Upon that being done, orders of mandamus may issue in each of these cases—not prerogative writs, but orders in these actions.

As to costs, in the case of the recorder, who says he has acted under what may be regarded as instructions from his superior officer, I am not disposed to award costs against him. This is the first time the question has come up; but I see no reason why the adverse applicants, who have taken upon themselves the burden of opposing these applications—very unnecessarily, as they might have allowed the official to justify himself—should not be called upon to pay the plaintiffs' costs.

The order, therefore, will be for the payment of the costs in each of these cases by the opposing claimants. . .

OCTOBER 24TH, 1906.

DIVISIONAL COURT.

BURKE v. TOWNSHIP OF TILBURY NORTH.

Municipal Corporations—Drainage—Deposit of Earth on Plaintiff's Land—Claim for Compensation—Remedy—Action—Forum—Drainage Referee.

Appeal by defendant corporation from judgment of CLUTE, J., dated 15th May, 1906, awarding plaintiff \$10 and costs.

The plaintiff was the owner of a part of lot 18 in the 1st concession of the township of Tilbury North, in the county of Essex. In June, 1904, the corporation contracted with one Roszel to construct a ditch or drain on the highway adjoining plaintiff's land. During operations Roszel, notwithstanding plaintiff's protest, dumped a large quantity of earth and mud on the boundary of plaintiff's land in such

a manner that plaintiff was unable to drain her property. The action was brought for damages sustained by reason thereof.

A. H. Clarke, K.C., for defendant corporation.

C. A. Moss, for defendant Roszel.

H. H. Bicknell, Hamilton, for plaintiff.

The judgment of the Court (FALCONBRIDGE, C.J., BRITTON, J., MABEE, J.), was delivered by

MABEE, J.:—Plaintiff's lands are assessed for the work that was being done in repairing the drain; in other words, she was a party to the by-law that was passed by the council for providing the funds for these repairs. The specifications prepared by the engineer provided that the earth excavated from the drain should be thrown upon the highway to the north of the drain. The contractor wished liberty to deposit some of this earth at certain cuts upon the adjacent lands to the south of the drain, and a number of owners gave their consent to his doing so. It is said that plaintiff's agent also consented to the earth being deposited upon plaintiff's lands; his authority to give such assent is denied; be that as it may, the whole of what is alleged as the trespass in this case is the action of the contractor in varying from the written specifications at certain portions of the work, and depositing the excavated earth upon the south instead of the north bank of the drain, such variation not being objected to by the other land-owners interested, and the contractor supposing that plaintiff had, through her agent, given her consent.

A purely local work was being undertaken; the township as a whole was not interested; the only persons concerned were those within the drainage area, whose lands were being taxed for the expense; the only persons particularly interested in the earth being deposited upon the north or south bank were the owners of the immediately adjacent lands. Under these circumstances, it was quite open to the parties to vary the specifications, with the consent of those interested, and it is contended that that is all that was done. If plaintiff gave no consent, and such has been found by the trial Judge to be the fact, then the deposit of the earth upon her land gave her a claim for compensation consequent upon the construction or repair of this drain. It

is not contended that the contractor did more than spread the earth as the specifications provided, except that it was spread upon the south instead of the north side of the drain.

Section 93 of the Municipal Drainage Act (as re-enacted in 1 Edw. VII. ch. 30, sec. 4), provides that "all proceedings to determine claims . . . arising between . . . individuals and a municipality . . . or between individuals . . . in the construction, improvement, or maintenance of any drainage work . . . or consequent thereon, or by reason of negligence . . . shall hereafter be made to and shall be heard or tried by the Referee only," &c., &c. Then sub-sec. 2 provides that these proceedings shall be commenced by the service of a notice setting forth the damages or compensation, and sub-sec. 5 provides that no proceeding within the section shall be instituted otherwise than as the section provides.

The legislature has therefore taken away the ordinary remedy by writ and proceedings following thereon in the High Court, County Court, or Division Court, as the case might be, and provided a forum for adjusting such claims. Formerly, where the party had misconceived his remedy and proceeded by writ, and it was later on discovered that his claim was one for compensation under the special Act, the Court transferred his claim to the Referee, and the cases are numerous where that was done. Now, however, no power exists in the Court to make any order of transfer, and where proceedings are taken for the recovery of claims that fall within sec. 93 otherwise than as provided by that section, they fail.

Section 95 provides for the local drainage area bearing the expense of working out the provisions of the Act, and where damages and costs are payable by a municipality arising from proceedings taken under the Act, all the lands and roads assessed for the drainage work contribute pro rata towards the payment thereof.

This plaintiff has a judgment against the defendant township for a large sum for costs payable out of the township funds generally, while had the proceedings been taken as the Act provides, plaintiff would have obtained her compensation, and it and the expense attendant upon adjusting it would have been borne by the lands for the benefit of which this work was undertaken.

I think it is clear that the claim of plaintiff falls under sec. 98, and that her remedy is as that section provides, and that the action is improperly brought in the High Court. . . .

I think the appeal should be allowed with costs and the action dismissed with costs throughout.

OCTOBER 25TH, 1906.

DIVISIONAL COURT.

RE SINCLAIR AND TOWN OF OWEN SOUND.

Municipal Corporations—Local Option By-law — Motion to Quash—Vote of Ratepayers—Town Divided into Wards—Right of Persons Owning Property in Different Wards to Vote more than once—Confusion from Colour of Ballot Papers—Persons Voting without Right—Irregularities in Taking of Vote—Effect on Result—Municipal Act, sec. 204.

Appeal by the town corporation from the order of MABEE, J., ante 239, quashing a local option by-law of the town of Owen Sound, which had been submitted to vote on 1st January, 1906, when 1238 votes were cast in its favour and 762 against it, and it was declared carried by a majority of 476.

F. E. Hodgins, K.C., and J. W. Frost, Owen Sound, for appellants.

J. Haverson, K.C., and W. H. Wright, Owen Sound, for Sinclair.

The judgment of the Court (MULOCK, C.J., MABEE, J., CLUTE, J.), was delivered by

MULOCK, C.J.: . . . It appears that Owen Sound is divided into four wards, and that a number of ratepayers were each rated in several wards, in which they held property qualification, and it was contended in their behalf that each one of this class was en-

titled to vote in each ward in which he was so rated. This was refused them, and one question is whether such refusal can be sustained.

The Liquor License Act (R. S. O. 1897 ch. 245, sec. 141) enacts that the council may pass what is commonly known as a local option by-law, provided that "before the final passing thereof it has been duly approved of by the electors of the municipality in the manner provided by the sections in that behalf of the Municipal Act."

The only provision in the Consolidated Municipal Act, 1903, entitling a ratepayer to vote in more than one ward in respect of a by-law is contained in sec. 355. That section is as follows:—"355. Where a municipality is divided into wards, each ratepayer shall be so entitled to vote in each ward in which he has the qualification necessary to entitle him to vote on the by-law."

The petitioner contends that this section applies to voting on the local option by-law in question, but the history of the section, including its context, does not, I think, support this contention. Tracing it backwards, the reference to enactments shews that the section had its origin in the Municipal Amendment Act, 1892, sec. 17 of which enacts as follows: "The following is added to the Municipal Act as section 309a: 'Where a municipality is divided into wards, such ratepayer shall be so entitled to vote in each ward in which he has the qualification to entitle him to vote on such by-laws.'"

Sections 308-9, immediately preceding this added section, deal with by-laws creating debts payable at a future date, and declare what shall be the qualification of a ratepayer to entitle him to vote thereon. Then follows the added section, which declares that "such" ratepayer, that is, the ratepayer of the kind mentioned in sec. 308 or 309, may vote in each ward in which he has the qualification to entitle him to vote "on such by-laws," that is, on such by-laws as are referred to in secs. 308-9, and which in *Re Croft and Town of Peterborough*, 17 A. R. 21, were held to be limited to by-laws creating debts.

Again sec. 309a says "each ratepayer shall be so entitled to vote." The word "so" clearly refers to some preceding provision entitling a ratepayer to vote, and this is found in secs. 308-9, each declaring that "every ratepayer . . . shall be entitled to vote on any by-law requiring the assent

of the electors, who," etc. The use here of the word "so" shews that the reference is to the kind of ratepayer thus described in secs. 308-9, namely, a ratepayer who is entitled to vote on a by-law creating a debt.

Section 309a being thus by its express language made applicable only to by-laws of the kind referred to in secs. 308-9, that is, to by-laws creating debts, it is unnecessary as an aid towards ascertaining its meaning to seek for the reason for such legislation. The reason itself, however, seems quite manifest. But for the added section a qualified ratepayer was entitled to only one vote, no matter to what extent the burdens of taxation created by the by-law should fall upon him or his property. The added section, in a somewhat crude fashion doubtless, sought to correct this apparent injustice, by allowing a ratepayer a vote in each ward in which he had the required property qualification.

If sec. 390a had remained unchanged, it is clear that it would not have applied to a local option by-law, it not being a by-law creating a debt. But the language of the section was changed by the consolidation of 1897, the commissioners having struck out the word "such" before "ratepayer" and substituted therefor the word "each," and also having struck out the words "on such by-laws" and substituted therefor the words "on the by-law."

The section thus changed reads as follows:—"Where a municipality is divided into wards, each ratepayer shall be so entitled to vote in each ward in which he has the qualification necessary to entitle him to vote on the by-law;" and, so changed, it appears as sec. 355 in R. S. O. 1897, and also as sec. 355 in the Consolidated Municipal Act, 1903, which is the Act now in force.

The substitution of the words "on the by-law" for the words "on such by-law" does not, I think, remove the restriction of the original wording. "On the by-law" is not synonymous with "on a by-law" or "on any by-law," but is restrictive, confining the right so to vote to some particular by-law. What by-law? Manifestly the by-law referred to in the preceding sections for creating a debt.

The verbal changes to the section, made in the first instance by the commissioners, do not, I think, enlarge its scope. Moreover, for the reason above set forth, the words "each ratepayer shall be so entitled to vote" appear to me

to expressly confine the application of the substituted section as found in the Revised Statutes of 1897 to the class of by-law referred to in the two immediately preceding sections, that is, a by-law creating a debt. Further, in interpreting the work of the commissioners in preparing the consolidation of the statutes, it must be assumed that they did not intend to change the law. To give to sec. 355 the meaning contended for by the petitioner would be to determine that the commissioners had extended to all classes of by-laws a system of voting which until then was limited to but one class.

The legislature in passing the Consolidated Municipal Act of 1903 re-enacted without change sec. 355 of R. S. O. 1897, and therefore its meaning remained unchanged. For these reasons, I am of opinion that in voting on the by-law in question no elector was entitled to more than one vote, and the objection based on the contrary view must fail.

The following further objections in respect of the validity of the by-law are taken by the petitioner:—

(a) The clerk of the said town did not prepare nor certify to the voters' list furnished to the several deputy returning officers, as required by secs. 152 and 348 of the Consolidated Municipal Act, 1903.

(b) No copy of the defaulters' list, certified by the treasurer or collector pursuant to sec. 137 of the Consolidated Municipal Act, 1903, was delivered by the clerk to the several deputy returning officers, as required by sec. 152 of the said Act.

(c) The town clerk did not deliver or cause to be delivered to the several deputy returning officers, at the said voting or election, the certificates prescribed by sec. 156 of the Consolidated Municipal Act, 1903.

(d) The several deputy returning officers, poll clerks, and agents who attended at the taking of the poll did not take the statutory declaration of secrecy prescribed by sec. 368 of the Consolidated Municipal Act, 1903.

(e) The several deputy returning officers and poll clerks at said voting or election did not record the names of the voters, their qualifications and residence, in the manner prescribed by sec. 165 of the Consolidated Municipal Act, 1903, and did not otherwise observe the provisions of said section.

(f) The several deputy returning officers did not certify as to the number of persons who voted at the respective polling places in the manner prescribed by secs. 177 and 362 of the Consolidated Municipal Act, 1903.

(g) The several deputy returning officers, at said voting or election, did not make and subscribe the declaration required by sub-sec. 2 of sec. 177 and by sec. 362 of the Consolidated Municipal Act, 1903.

(h) Persons other than voters were allowed to enter the polling compartments or polling places and to interfere with voters in the marking of their ballots, contrary to the provisions of the said Act.

(i) The voters' lists used at said election or voting were not prepared or used in the manner prescribed by the Consolidated Municipal Act, 1903, and the Voters' Lists Act.

(j) The by-law was not published in the manner provided by sec. 338 of the Consolidated Municipal Act, 1903.

(k) The clerk of the said town did not deliver to the different deputy returning officers the directions to voters prescribed by secs. 146, 147, and 352 of the said Act.

4. That at the said voting or election a large number of persons voted upon the said by-law who were not legally entitled to vote thereon and who were disqualified from voting.

5. That the said voting or election was not regularly conducted, in that the ballots used thereat were similar in form and description to the ballots used in connection with another by-law, No. 1178, then being voted upon, whereby the voters were confused or misled.

The matters complained of in the above quoted objections lettered a, b, c, d, e, f, g, h, i, and k, have to do with the machinery in connection with an election under the Act. The formalities said to have not been complied with are not such as are required by the statute, in express words, to be observed as a condition precedent to the right to pass the by-law, but come within the curative provisions of sec. 204 of the Municipal Act.

The meaning of that section has received judicial interpretation on several occasions. . . .

[Reference to *Re Huson and Township of South Norwich*, 19 A. R. 350; *Re Young and Township of Binbrook*, 31 O. R. 108, 111; *Woodward v. Sarsons*, L. R. 10 C. P. 733.]

In the present case there is nothing to shew or even to suggest any intentional violation of the directions of the Act. Nor is there any reason for believing that any disregard of the statutable formalities called for by the Act affected the result. There is no evidence to shew that a single elector was prevented from recording his vote, or that the return was not made in strict accordance with the voting.

Every elector appears to have had the free and fair opportunity of voting for or against the by-law, and out of the total number of 2,000 votes cast, there was a majority of 476 in its favour. It, therefore, seems to me that the election was conducted in accordance with the principles laid down in the Act, and that the curative provisions of sec. 204 may be properly applied in respect of the matters referred to in the objections lettered a, b, d, e, f, g, h, i, k, and they are therefore overruled.

As to objection j, that the by-law was not published in the manner provided by sec. 338 of the Act, the petitioner offered no proof in support of this objection, whilst the clerk of the municipality swore that it was published as required by law. This objection, therefore, is overruled.

As to objection No. 4, that a large number of persons voted upon the by-law who were not legally entitled to vote thereon and who were disqualified from voting, it is said 100 of such persons were allowed to vote. Conceding the full force of such an objection, it should not, I think, be allowed to defeat the by-law. For, even taking the alleged 100 illegal voters from the majority cast in favour of the by-law, there would still remain a clear majority of 376 in its favour. It may also be observed by reference to the affidavits in support of the objection that there is no evidence to prove want of qualification on the part of at least 75 of the 100. The petitioner has assumed that a person is not a qualified elector unless at the time of voting he is possessed of the identical qualification assigned to him in the voters' list or assessment roll, and he has confined his evidence to endeavouring to prove that these persons did not possess the qualifications credited to them by the assessment roll, whereas a person may be possessed of other sufficient qualification than that mentioned in the roll, and in that event would be entitled to vote, notwithstanding that he may not possess the particular qualification credited

to him. For all that appears, over 75 of the persons whose votes are objected to may be qualified voters, and the petitioner has failed to discharge the onus which was upon him to prove want of qualification, but, even if none of the whole 100 were qualified, it is not shewn that their being allowed to vote was the result of any evil intent, and the proper mode in this case of correcting such an error would be by deducting the number of illegal votes from the majority. Such a deduction would not affect the result of the election. This objection must, therefore, be overruled.

As to the last objection, No. 5, that the voting was not regularly conducted in that the ballots used thereat were similar in form and description to the ballots used in connection with another by-law then being voted upon, whereby the voters were confused or misled, it appears that at the time of the voting on the by-law in question another by-law was also being submitted to the electors, being a by-law to authorize a loan of a sum of money to a manufacturing company, and it is contended that the ballots in each case were so similar as to lead to confusion. There is nothing in the Act prescribing any duty as to the colour of ballot paper. The ballot paper for the local option by-law was scarlet, that for the other by-law pink, the difference in colour when they are side by side being most noticeable. The local option by-law has printed on its face in long primer type, the following words:—"Voting on by-law No. 1172 of the Town of Owen Sound, A by-law to prohibit the sale of liquor by retail in the municipality of the Town of Owen Sound, submitted to the council of the Town of Owen Sound, November 13th, 1905." Whilst the other ballot paper has printed on its face, also in long primer type, the following words:—"Voting on by-law No. 1178. A by-law to authorize a loan of \$25,000 to the Kennan Woodenware Manufacturing Company, Limited, upon mortgage, and to authorize the issue of debentures to raise said loan, to fix the assessment for ten years, and to confirm a certain agreement between said company and the corporation. Submitted to the council of the Town of Owen Sound December 6th, 1905."

It appears to me that no person of ordinary intelligence, exercising ordinary care, could mistake one ballot paper for the other. It is the duty of the voter before marking his ballot to read it, and I am unable to understand how

the municipality could have made it easier for the voter to distinguished between the two ballots in question, and, therefore, as regards the ballot used on this occasion, I think it meets all the requirements of the Act. This objection is therefore overruled.

The Court being of opinion that the voting was conducted in accordance with the principles of the Act, and that no disregard of statutable formalities affected the result, this appeal should be allowed with costs and the original application dismissed with costs.

ANGLIN, J.

OCTOBER 26TH, 1906.

CHAMBERS.

MONTGOMERY v. RYAN.

Summary Judgment—Rule 603—Suggested Defence—Bank—Account—Reference.

Appeal by defendant from order for summary judgment granted by Master in Chambers, ante 430.

W. M. Hall, for defendant.

W. N. Ferguson, for plaintiff.

ANGLIN, J., ordered that if defendant files an affidavit stating that overcharge of interest will wipe out debt, defendant shall have leave to defend in respect of part of the claim, \$4,000. If affidavit not filed, judgment will stand for \$8,000. Costs of motion before Master to be costs to plaintiff in the cause. Costs of appeal to be costs to defendant in the cause.

ANGLIN, J.

OCTOBER 26TH, 1906.

TRIAL.

MCCORMACK v. TORONTO R. W. Co.

Damages—Assignment of Claim for Damages ex Delicto—Action by Assignee—Cause of Action—Chose in Action—Invalidity of Assignment.

Plaintiff sued for personal injuries to himself sustained by his being run down by a car of defendants, and also for

the killing of the horse which he was riding, the property of his master—claiming as to the latter, under an assignment from the master made in consideration of plaintiff's releasing a claim for wages amounting to \$8. The jury found defendants liable, and assessed the damages for plaintiff's personal injuries at \$100 and for the killing of the horse at \$125.

J. M. Godfrey, for plaintiff.

D. L. McCarthy, for defendants.

ANGLIN, J.:—The interesting question is raised by the defendants, whether the right of the master to recover damages for the killing of his horse by defendants was assignable to plaintiff.

Section 58, sub-sec. 5, of the Judicature Act is as follows:—"Any absolute assignment, made on or after the 31st day of December, 1897, by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this section had not been enacted) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same and the power to give a good discharge for the same without the concurrence of the assignor." This statutory provision has been held to have only affected procedure and not to have enlarged the class of things lawfully assignable.

In *King v. Victoria Insurance Co.*, [1896] A. C. 250, the Supreme Court of Queensland having held that the words "debt or other legal chose in action" include "all rights the assignment of which a court of law or equity would before the Act have considered lawful" (p. 254), Lord Hobhouse speaking for the Judicial Committee said (p. 256):—"Their Lordships do not express any dissent from the views taken in the Court below of the construction of the Judicature Act with reference to the term 'legal chose in action.'" See too *Tolhurst v. Associated Portland Cement Co.*, [1902] 2 K. B. 660, 676. [1903] A. C.

414, 424: *British South Africa Co. v. Companhia de Mocambique*, [1893] A. C. 602, at p. 629. But, while the Queensland Court expressly held that a right to recover damages for injuries to a cargo of wool sustained in a collision, was a "legal chose in action" and assignable to the plaintiff as such, the Judicial Committee "prefer to avoid discussing a question not free from difficulty, and to express no opinion what limitation, if any, should be placed on the literal meaning of that term. They rest their judgment on the broader and simpler ground that a payment honestly made by insurers in consequence of a policy granted by them and in satisfaction of a claim by the insured, is a claim made under the policy, which entitles the insurers to the remedies available to the insured:" p. 256. The assignability they rest upon the right of subrogation, holding that the insurer being thus entitled to the remedy of the insured, the assignment in writing under the Judicature Act was effectual to enable the insurer to sue in his own name. The assignability of such a right of recovery, therefore, apart from the right of subrogation, rests entirely upon the authority of the Supreme Court of Queensland and not at all upon that of the Privy Council. But see *Pritt v. Connecticut Fire Insurance Co.*, 23 A. R. 499, 453, per Osler, J.A.

In *Laidlaw v. O'Connor*, 23 O. R. 696, Armour, C.J., regarding a claim by a client against a firm of solicitors for negligence in directing the distribution of certain moneys, as arising out of tort, held it not assignable. In the Divisional Court, while this judgment was affirmed on the ground of absence of proof of negligence, MacMahon, J., treating the claim as one "arising out of contract," held it to be assignable . . . But in *May v. Lane*, 71 L. J. 869, the English Court of Appeal held that a right to recover damages for breach of contract to lend money is not assignable. . . .

In *Dawson v. Great Northern R. W. Co.*, [1904] 1 K. B. 277, Wright, J., deeming compensation for an injurious affection of lands under statutory authority to be in the nature of damages for a tort, held that the right to recover such compensation is not a legal chose in action, and is therefore non-assignable. The Court of Appeal reversed this judgment, on the ground that such a claim for compensation is not a claim for damages for a wrongful act. [1905]

1 K. B. 200; but the Lords Justices certainly do not countenance the view that a right of action *ex delicto* is assignable.

There is a very considerable body of English authority for the proposition that a right to damages, though arising *ex delicto*, is a chose in action: *Colonial Bank v. McWhinney*, 30 Ch. D. 261, 275, 287, 11 App. Cas. 426; *Termes de la Ley*. Choses in Action; *Blount's Law Dictionary*, Chose in Action; *Williams on Personal Property*, 12 ed., p. 4. Blackstone apparently held the contrary view: see articles in *Law Quarterly Review*, vol. 10, pp. 143, 152; vol. 9, p. 311; vol. 20, p. 113; *Warren's Choses in Action*, p. 161: *Cohen v. Mitchell*, 25 Q. B. D. 262; . . . *Stanley v. Jones*, 7 Bing. 369, 375; . . . *Simpson v. Lamb*, 7 E. & B. 84; *Traill & Sons v. Actieselskabet Dalbeattie Limited* (1904), 6 F. 798.

Notwithstanding the idea of several text writers that causes of action in tort arising out of injuries to property, in which the measure of damages is certain, differ materially from causes of action arising out of personal injuries: that many objections which may be urged against holding the latter class of causes of action to be assignable do not apply to the former; and that although the latter are non-assignable the former may be assigned—a view which receives some support from the dictum of Park, J., in *Stanley v. Jones*, *ubi sup.*, and is held by many Courts in the United States, I can find no English or Canadian authority upon which to rest such a distinction. It is true that causes of action of the former class pass to assignees in bankruptcy, while those of the latter do not. But this is because of the construction put upon the Bankruptcy Acts.

The decisions of the English Court of Appeal in *May v. Lane*, of Wright, J., in *Dawson v. Great Northern R. W. Co.*, and of Armour, C.J., in *Laidlaw v. O'Connor*, afford a body of authority which I may not disregard. They are quite inconsistent with the assignment of a cause of action *ex delicto*, though it be for injury to property as distinguished from personal injury. This view as to the non-assignability of rights to damages *ex delicto*, accords with doctrines of English jurisprudence which have obtained for many years: *Y. B.*, 34 Hen. VI. 30, pl. 15; *Prosser v. Edmonds*, 1 Y. & C. 481, 497, 499; and, excluding American

cases, is in conflict only with the Queensland decision in King v. Victoria Fire Insurance Co. It must, in my opinion, prevail.

There will therefore be judgment for plaintiff for \$100 for his personal injuries, and dismissing the claim for loss of the horse. As plaintiff apparently brought his action for both causes in good faith, and with a desire to avoid multiplicity of suits, I exercise my discretion as to costs in his favour to the extent of awarding him costs on the County Court scale without set-off.

CARTWRIGHT, MASTER.

OCTOBER 27TH, 1906.

CHAMBERS.

McDOUGALL v. MEIR.

Venue—Change—Convenience—Delay—Counterclaim.

Motion by defendant to change venue from Owen Sound to Sault Ste. Marie.

H. R. Frost, for defendant.

W. H. Blake, K.C., for plaintiff.

THE MASTER:—The action is ready to go to trial at the non-jury sittings at Owen Sound on 5th November next. If the venue were changed, there would be a delay of from 6 to 7 months, as the sittings at Sault Ste. Marie are usually held in June. This would be a sufficient ground for refusing to make the change: *Servos v. Servos*, 11 P. R. 135.

The motion is based on the counterclaim, which defendant says will necessitate "over 20 witnesses" who reside at the Sault. I am not impressed with this, in view of the uncontradicted affidavit of plaintiff, and the admission by defendant of a liability of \$1,100 in January last, when nothing was said of the counterclaim.

Defendant invoked the decision in *Farmer v. Kuntz*, 7 O. W. R. 829, affirmed 8 O. W. R. 4. There the facts were entirely different, as almost all the witnesses on both

sides were residents of the county of Huron, in which the cause of action and counterclaim both arose. That decision should govern if in the present case plaintiff had for his own convenience or to secure a speedier trial laid the venue at Toronto or Hamilton.

Motion dismissed; costs in the cause.

OCTOBER 27TH, 1906.

DIVISIONAL COURT.

SMITH v. McINTOSH.

Master and Servant—Injury to Servant—Workmen's Compensation Act—Notice of Injury—Reasonable Excuse for Failure to Give—Release of Cause of Action—Inadequacy of Payment—Surrounding Circumstances—Invalidity.

Action for damages for injuries sustained by plaintiff on 13th March, 1905, while employed as a steam engineer in the mill or factory of defendants at Toronto.

The action was tried before ANGLIN, J., and a jury, at Toronto, on 12th and 13th February, 1906.

Plaintiff was injured by the bursting of a blow-pipe attached to the boiler which supplied the steam power to defendants' mill.

Defendants, besides denying any negligence, and alleging contributory negligence on the part of plaintiff, set up the payment before action of \$30 in full settlement, satisfaction, and discharge of plaintiff's claim. The further objection was taken, on motion for nonsuit, that no notice was served as required by the Workmen's Compensation for Injuries Act.

The trial Judge submitted questions to the jury as to negligence, etc., and asked them to assess the damages. The jury answered all the questions in favour of plaintiff, and assessed the damages at \$250.

Upon the motion for a nonsuit, the trial Judge held that want of notice was fatal. In giving his decision he further said: "I would also find, if necessary, that the release given

was given by plaintiff with full knowledge of its contents, was given by him with full intention of releasing defendants from all liability." And upon the two grounds the action was dismissed.

Plaintiff appealed and asked for judgment for \$250 upon the findings of the jury.

J. M. Ferguson, for plaintiff.

R. U. McPherson, for defendants.

The judgment of the Court (FALCONBRIDGE, C.J., BRITTON, J., CLUTE, J.), was delivered by

BRITTON, J.:—The grounds of appeal taken by plaintiff in his notice of motion which were relied upon on the argument are that the trial Judge erred: (1) in holding that there was not reasonable excuse for the omission on the part of plaintiff to give notice as required by the Workmen's Compensation for Injuries Act; and (2) in holding good the document alleged to have been executed by plaintiff as a release by plaintiff to defendants so as to prevent plaintiff's recovery in this action.

This seems to me, upon all the evidence, to be clearly a case where under the Act there was reasonable excuse for the want of notice. It was practically conceded that defendants have not been by want of the formal notice prejudiced in their defence. Mr. R. K. McIntosh, the manager of defendants, knew of the accident on the day it happened, and he informed a Mr. Wickens, the chief engineer of the Canadian Casualty Boiler Insurance Company, in which company defendants held a policy, of this accident. Defendants knew that Wickens saw plaintiff shortly after the accident, and on 25th March, 1905, defendants received Mr. Wickens's report. On 26th March plaintiff wrote to Mr. McIntosh about the matter, and on 28th Mr. McIntosh replied, stating in substance that if the matter was not arranged with Wickens, he (McIntosh) would go further into it, and making a suggestion as follows: "It might be well to leave this until you are here again, when I shall discuss the matter with you, for, as no doubt you are aware, I shall do all I can to help you to obtain from these people sufficient to cover your loss for time and doctor's bill. To this letter plaintiff replied on 29th March, explaining from his

point of view what had taken place between him and Wickens, and asking to have the \$30 which Wickens promised sent. This was not sent, and no reply was sent to plaintiff's last letter.

In due course, after some weeks of remaining in bed, plaintiff returned to work for defendants. Mr. McIntosh appeared to desire to act as plaintiff's friend down to 13th May, when the \$30 was handed over, and plaintiff continued to work for defendants until some time after that date. By the conduct of defendants plaintiff was thrown off his guard as to seeking legal advice, and as to informing himself about giving and as to giving the statutory notice.

I think there was in this case such reasonable excuse for want of notice as is within the contemplation of the statute. The late case of *O'Connor v. City of Hamilton*, 10 O. L. R. 529, 6 O. W. R. 227, refers to and is consistent with *Armstrong v. Canada Atlantic R. W. Co.*, 4 O. L. R. 560, 1 O. W. R. 612, and this case warrants my conclusion upon this point.

I confess to having had considerable difficulty in coming to a conclusion on the question of settlement and release. The case is very close to the line. When the alleged settlement was made, plaintiff had gone back to work, and there was the confidential relationship of master and servant between them. There is a great deal to be said against allowing such a settlement to stand, reading all the evidence in the way most favourable to defendants. . . .

[Remarks of Boyd, C., in *Doyle v. Diamond Flint Glass Co.*, 8 O. L. R. 499, 502, 3 O. W. R. 921, referred to.]

No doubt plaintiff was competent to make his own settlement if the parties had come together, plaintiff making a claim and defendants disputing it, either as to liability or amount, so that there would have been discussion and determination once for all. But that is not what was done. Wickens, who was acting for the insurance company, was promptly at plaintiff's bedside, and so sympathetic that plaintiff, certainly at first, thought him some good friend willing to compensate him for 3 weeks' loss of wages. It is not pretended now that, if plaintiff is entitled to recover at all, this sum is anything like sufficient. It was in lieu of wages for 3 weeks, the third week having been entered upon. Nothing for any further time and nothing for pain and suffering or for medical attendance. Inadequacy of consid-

eration is not the test, but the circumstances must all be looked at to see whether plaintiff's intention was then to release all claim, as defendants now assert. Plaintiff had no legal adviser, and, although he could write his own name, and do it very well, he could not write a letter. His son-in-law wrote two letters for plaintiff, and I may say at once that one of these, the letter of 29th March from plaintiff to McIntosh, was mainly the cause of my difficulty in determining just what plaintiff understood he was doing and intended to do when he signed the receipt on 13th May.

The accident happened on 13th March. Plaintiff was in bed 8 weeks. His medical attendant made about 54 visits, and his account was \$125.

Plaintiff's account of the alleged settlement, as given in examination and cross-examination, is, in substance, that quite a few days after he had gone back to work, McIntosh asked him if he was satisfied (with the settlement Wickens had made), and plaintiff said he was not, and McIntosh said he would telephone for Wickens. Wickens did not come to see plaintiff. A few days after that conversation, plaintiff got a message that McIntosh wished to see him at the office. At the office McIntosh had the paper ready, and simply said, "Robert, sign this, and I will pay you \$30 in money;" "Sign this cheque, and I can draw the money out of the bank." "These were all the words." . . .

Plaintiff had in another part of his examination said that at the first conversation after going back to work, he asked McIntosh if he was going to do anything for him, and McIntosh replied, "You have arranged with the Boiler Insurance Company," and plaintiff asked McIntosh to telephone Wickens. Whether Wickens was telephoned for or not, he did not appear, and at the second interview, at the office, plaintiff signed the receipt, and indorsed the boiler company's cheque for \$30, which that company had made payable to the order of defendants. Plaintiff did not give candid or satisfactory answers as to his signature to the receipt. I think he knew that the signature was his, and should have said so at once, and his hesitancy and beating about the bush make it more difficult to accept his testimony when in contact with other evidence. Plaintiff knew that he signed a receipt and indorsed a cheque for \$30.

The evidence of Mr. McIntosh is that after plaintiff returned to work, he, McIntosh, was passing the boiler shop one morning and spoke to plaintiff, asking him how he was feeling. Plaintiff replied that he was getting better. McIntosh said he had the \$30 for him, if he wanted to come and get it. Plaintiff said he would like to see Wickens first, and asked, "would you telephone for me." McIntosh says he did telephone, and got word that Wickens would come, but, as I have said, Wickens did not come. McIntosh said further that a few days after and when passing the boiler shop again, plaintiff asked him if Wickens had been there, or if he (McIntosh) had heard. McIntosh replied that he had not heard. Then plaintiff said: "Well, I guess I won't wait; I want to close it up; so I will take the \$30." McIntosh then said: "All right, I will be back in the office in a little while, and I will send for you." Plaintiff, after a little, went to the office. McIntosh said, "Bob, this will clean the thing up." The receipt had been prepared. It was written out, and the indorsement on the cheque was made. . . . "I took him over to the second standing desk in the office, and I said: 'Bob, this cleans the whole thing up; you had better read it.' He said, 'I have not my glasses,' and I said, 'I will read it to you.' I read it aloud and very distinctly, standing close to him, and he signed it in my presence. I turned over the cheque, and I said: 'This is the cheque, made payable to me; I have indorsed it to you; you sign it, and I will put it in the deposit and cash it for you.' He signed it, and I gave him the \$30, and I said, 'Bob, this cleans the thing all up.'"

This evidence presupposes a settlement with Wickens, and there was no such settlement in fact. The evidence of Wickens is that he had only one interview with plaintiff, and then plaintiff told him he would be laid up for 2 or 3 weeks. Wickens states: "I told him I was sorry for him; I told him that if he would be satisfied perhaps I could get him enough to pay him for 3 weeks. . . . He said he was surprised—that he did not expect to get anything." So Wickens left and made a report to his company which resulted in his company sending a cheque to defendants for \$30. Wickens did not explain to plaintiff why he (Wickens) was to give plaintiff the \$30, and he did not tell plaintiff that the company were amenable in any way, but he did tell him that "the company had a policy covering the McIntosh

place." . . . On cross-examination he said that he thought the company were "practically" making a present to plaintiff of \$30.

If Wickens, instead of having to report to defendants and having a cheque sent to them, had actually, and under the circumstances as stated by himself, handed over the \$30 and taken such a receipt as was taken by McIntosh, could that be held as a binding release upon plaintiff? I think not.

Wickens was simply interested for the insurance company, and he offered to pay for 3 weeks' wages, because he thought plaintiff would be back to work at the end of that time. When the alleged settlement actually took place, defendants knew that plaintiff had been laid up for a much longer time than 3 weeks, and that plaintiff was not then well, but only "getting better." There seems to have been no negotiation by defendants for a settlement. They notified Wickens, and put him upon the case. There was the correspondence and the letter of 29th March, 1905, before referred to. This letter is the only thing that offers reasonable argument in favour of upholding the alleged settlement. Plaintiff is comparatively illiterate. He could not write, and I am inclined to think could not dictate such a letter—although he would, as against defendants, if the letter had been acted upon and if held to mean a settlement of his entire claim against defendants, be bound by it. McIntosh admits that plaintiff did not read the receipt or read the indorsement on the cheque—plaintiff says because he could not read writing—McIntosh says because plaintiff had not his glasses.

With all the evidence before me, I have carefully read and considered the cases to which we were referred by counsel for defendants. . . .

[Reference to *North British R. W. Co. v. Wood*, 18 Ct. Sess. Cas. (Rettie) H. L. 27; *Begg v. Toronto R. W. Co.*, 6 O. W. R. 239.]

I am of opinion that all the cases cited are distinguishable upon the facts. Plaintiff, in my opinion, did not understand the situation, or that a complete release was being asked of him. He did not intend to release defendants from all liability, if there was such liability. He intended to accept the \$30 as offered by the insurance company as in-

demnity for the 3 weeks' wages, and to that extent, and so far as was under discussion, to release both insurance company and defendants. It would not be difficult in very many cases for the representative of an insurance company, by being early after an accident in communication with an injured person, and by expressions of sympathy and offering payment in lieu of wages, to get a receipt, purporting to be in full, which the person giving it would not understand to be a complete release to either the insurers or insured.

I do not express any opinion as to the position of defendants with the Canadian Casualty and Boiler Insurance Company. I do not say that defendants are at all prejudiced by what has taken place. It may be that Wickens did not state to defendants fully and truly what had taken place between him and plaintiff. If defendants are prejudiced, it may be by reason of McIntosh not seeing Wickens after the receipt of the cheque and after the receipt of plaintiff's letter of 29th March, before handing over the proceeds of the cheque. Apparently McIntosh intended to see him—else why did he wait until after plaintiff's return to work before saying anything more to plaintiff?

The damages found are \$250. There is no reason to think, from the . . . charge or from the question or answer, that the jury took the payment of \$30 into consideration in fixing the amount, so that sum should be deducted from the \$250.

Appeal allowed with costs, and judgment for plaintiff for \$220 and costs.

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BOYD, C.

OCTOBER 29TH, 1906.

TRIAL.

McGREGOR v. VILLAGE OF WATFORD.

Highway—Dedication — Plan — Registration. — Lots Sold Fronting on Highway as Laid out—Incorporation of Village—Costs.

Action against the corporation of the village of Watford and two men named Kelly, for a declaration that a certain parcel of land was not part of a highway, but was the property of plaintiff, and for an injunction and damages in respect of trespass thereon.

BOYD, C.:—Having referred to cases cited, I retain the opinion expressed at the trial, that the road in question was a public highway subject to the jurisdiction of the municipality, and the judgment provisionally announced should be made absolute.

The locus in quo was marked as a street on a registered plan made and filed, no doubt, while yet the locality was part of the township, but yet practically contemporaneous with its being set apart as an incorporated village. The plan filed on 3rd June, 1873, was, no doubt, in actual anticipation of the incorporation of the village, which was consummated on 25th June, 1873. The first sale of lots made in recognition and affirmance of the plan by the owner was in 1876. Subsequent legislation, which was retroactive, declared that allowances for roads which have been or may

be laid out in cities, towns, and villages, and fronting upon which lots have been sold, should become public highways. See sec. 62, R. S. O. 1887 ch. 152; *Roche v. Ryan*, 22 O. R. 107; *Sklitzsky v. Cranston*, ib. 590, 593; and *Gooderham v. City of Toronto*, 25 S. C. R. 246, 261, 262. I am disposed to hold also, if it were necessary, that the road in question laid out in 1873 has been so used and controlled by the municipality and so abandoned by the owner and his successors in title, as to entitle the defendants to deal with it as they have done. These matters I commented on at the close of the argument.

Judgment is to dismiss the action with one set of costs (and two counsel fees, senior and junior) to the defendants.

BOYD, C.

OCTOBER 29TH, 1906.

TRIAL.

CANADIAN OIL FIELDS CO. v. TOWN OF OIL SPRINGS.

Assessment and Taxes—Mineral Lands—Principle of Assessment—Buildings and Plant—Scheme of Assessment Act, 1904—Valuation—Clerical Error.

Action for a declaration that an assessment made upon plaintiffs was illegal, and to restrain defendants from enforcing it.

BOYD, C.:—Sub-section 3 of sec. 36 of the Assessment Act of 1904 (4 Edw. VII. ch. 23 (O.)), is not a novel provision. It has been in force since 1869 (33 Vict. ch. 27, sec. 5), and was then introduced in order to encourage investors in mining and mineral propositions by keeping down the assessable value to that of farming lands. The evidence in this case is that if the actual value of the lands in question as mineral lands was to be the basis of taxation, the burden would be much more onerous than it now stands.

The contention here is briefly this, that it was in the power of the assessing body of the municipality to assess

both land and buildings in the case of mineral lands. The only power, it is argued, was to fix the value of the lands (apart from all structures thereon) on an agricultural basis, and then further to tax on the footing of the income produced. But it is shewn and conceded on all hands that there is no income as to this property, so that the point is reduced to whether "buildings" could be assessed separately as well as the land.

Regard now the scheme of the Act. By the interpretation clause the word "land" shall include (b) trees, &c., (c) minerals, gas, oil, &c., (d) all buildings, structures, machinery, and fixtures erected or placed upon, in, over, under, or affixed to land. (Section 2, sub-sec. 7.)

By sec. 5 all real property (which includes buildings and structures thereon) shall be liable to taxation, subject to certain exemptions, of which, by sec. 5, sub-sec. 16, "all fixed machinery used for manufacturing or farming purposes" is exempt from taxation, but this exemption, as appears from the very frame of the whole sub-clause, does not cover natural gas and oil appliances constructed upon this property. It was not suggested that this machinery and plant were used for manufacturing purposes. By sec. 22, the assessor is to ascertain and set down in the roll particulars as to the value of the land, exclusive of the buildings (13), and further (14) as to the value of the buildings.

Then as to valuation of lands: real property shall be assessed at its actual value except in the case of mineral lands: sec. 36 (1). In case of land with buildings the value of each separately is to be ascertained and set down in different columns. And the test for the value of the buildings is the amount by which the value of the land is thereby increased: sec. 36 (2). As to mineral lands, the buildings thereon shall be valued and estimated at the value of other lands in the neighbourhood for agricultural purposes: sub-sec. 3. I do not read this to mean that the value of the mineral lands and buildings is to be estimated as if there were no buildings thereon, or, to put it another way, that the value of mineral lands and all structures thereon were to be valued as if they were agricultural lands without buildings. Agricultural buildings are to be valued and assessed if the land is improved thereby—so are structures on mineral lands to be assessed and valued. The scheme of

the Act is to put mineral lands and buildings on the footing of farming lands and buildings—but not to give to mineral lands any further benefit, such as to exempt all structures and appliances thereon in the nature of buildings from being taxable in any wise. Probably the trouble and apparent difficulty has arisen from too literally regarding the section when it speaks of “the lands in the neighbourhood for agricultural purposes” as if it meant to exclude the buildings. But the term “land” as used in the statute *per se* includes buildings; only they are to be kept separate in making up the values. And it is only in this new Act that buildings are to be kept separate from lands in the analysis of assessment: sec. 22 (13, 14). In the earlier Acts was no such distinction. We need not fall back on cases to find out what is meant by “buildings.” The interpretation clause suffices, and under its terms all the derricks, tanks, pipes, jerkers, triangles, and other odd-sounding contrivances may readily be grouped.

I see no ground to interfere with the conclusion of the County Judge on this head.

The assessor gave evidence that he valued all the buildings or improvements on the property at a rate of \$75 for each well—which he says was greatly below their real value, and that on any footing whether of agricultural or other purpose, or even as old iron, they would be worth \$75; I am not concerned with values — with the little or much, or the less or more, it is enough if the buildings are assessable. In that case jurisdiction to assess attached, and the judgment of the County Judge on the amount is conclusive: Act of 1904, sec. 75.

It is admitted, however, that there is a clerical error in his figuring by which “three” is extended as “five,” and that the valuation as to certain warehouse buildings, from which the Court of Revision deducted \$2,000, was intended to be affirmed by the Judge. The amount of assessment should be reduced by this \$2,000; but in other respects the action fails.

As to so much of the action as relates to this clerical error, no costs; as to the rest of the litigation, costs to defendants.

MACLAREN, J.A.

OCTOBER 29TH, 1906.

C.A.—CHAMBERS.

CROWN BANK OF CANADA v. BRASH.

Leave to Appeal to Court of Appeal—Order of Divisional Court Reversing Judgment at Trial—Grounds of Appeal—Judicature Act, sec. 76 (1) (g).

Motion by defendant Brash for leave to appeal to the Court of Appeal from order of a Divisional Court, ante 400, reversing judgment of TEETZEL, J., who tried the case with a jury.

G. H. Watson, K.C., for applicant.

F. Arnoldi, K.C., for plaintiffs.

MACLAREN, J.A.:—The action is based upon promissory notes discounted by the bank at the request of one Campbell, purporting to act for a firm composed of defendant and Campbell, but which are said to be forgeries and discounted without the authority or knowledge of defendant. The jury found that the bank manager had notice or knowledge of the want of authority of Campbell, but also found that he acted honestly and in good faith. Teetzel, J., relying on the first of these answers, dismissed the action; the Divisional Court, acting on the latter answer, gave judgment for the bank.

Defendant Brash urges the following as special reasons sufficient under sec. 76, sub-sec. 1 (g), of the Judicature Act, to entitle him to such leave: that the amount in question is nearly \$1,000, being said to be \$940; that the Divisional Court reversed the decision of the trial Judge and set aside the answer as to notice or knowledge without holding that there was no evidence to be submitted to the jury upon this point; that the answer as to good faith did not override that as to notice, and was not sufficient alone under the Bills of Exchange Act to entitle the bank to judgment; that there was such evidence and sufficient to justify the answer as to notice; that if the trial Judge had been in the Divisional Court, defendant could have appealed

without leave; and that this was not a proper case for the Divisional Court to enter judgment; but at most it should have ordered a new trial.

It is to be observed that the first requirement in the old sec. 77 of the Judicature Act as to leave does not appear in the section of the Act of 1904 which superseded it, which is now sec. 76 above mentioned. I was not referred to any decisions under the new section on this point, nor am I aware of any. I am of opinion, however, that the reasons existing in this case would have been sufficient to have justified leave under the old law, upon the decisions.

Motion granted; costs in the cause.

CARTWRIGHT, MASTER.

OCTOBER 30TH, 1906.

CHAMBERS.

DAVIES v. SOVEREIGN BANK.

Parties—Joinder of Defendants—Pleading—Specific Performance—Motion to Compel Plaintiff to Elect to Proceed against One of Two Defendants—One Claim against both Defendants.

This action was begun in June, and the statement of claim was delivered on 20th August, 1906.

The statement of defence of defendants the Corporation of the City of Toronto was delivered on 8th September. The amended statement of claim was delivered on 29th September, and on 23rd October the defendants the city corporation gave notice of a motion to compel plaintiff to elect whether he would proceed in his action against them or against defendant Eckardt.

The motion was argued on 26th October.

F. R. MacKelcan, for defendants the city corporation.

W. B. Laidlaw, for defendants the Sovereign Bank.

W. H. Blake, K.C., for defendant Eckardt.

Frank Arnoldi, K.C., for plaintiff.

THE MASTER:—It would seem that the motion is in any case too late now that the action is ready for trial, notice of which has been given by the Sovereign Bank.

Waiving that objection, it seems no less evident that the motion cannot succeed unless the amended statement of claim differs materially from the original.

In that the allegation was that the city corporation alleged that Eckardt was their agent at the sale which is in question. The city corporation were not otherwise mentioned.

To this their statement of defence was delivered as above. It denied that the city corporation authorized Eckardt to bid for them at the sale. The amended statement of claim alleges as to the city corporation that they were represented at the sale by one or more persons authorized to bid on their behalf, and that such persons arranged with Eckardt to bid in their stead, which he did, "and on each occasion when his bidding procured the said property to be knocked down to him he bid for the City of Toronto;" that the city corporation before action refused to disclaim; and that defendant Eckardt now denies that he bid for or purchased on behalf of the city corporation.

So far as the city corporation are concerned, it does not appear how they are being attacked on a different ground in the amended statement of claim from that set up in the original. The same relief is asked as against Eckardt and the city corporation, viz., specific performance of the contract for purchase, as plaintiff alleges it to have been made.

In any case I think that the decision in *Evans v. Jaffray*, 1 O. L. R. 614, applies. There the Chancellor said: "Despite the form of pleading, there is such unity in the matters complained of as between all parties as justifies the retention of the defendants who appeared."

Here it would almost seem as if the city corporation wished to deny the agency of Eckardt, and yet keep any other claim they may have. It is not easy to understand, otherwise, why at first they did not wholly disclaim, and then, no doubt, the action would have been discontinued as against them. They did not deliver any amended statement of defence.

The amended statement of claim adheres to the allegation that Eckardt at the sale was bidding for the city. As against the city and Eckardt, plaintiff has only one claim, viz., to have the sale, as he understood it, carried out. But he is in doubt as to whether the city or Eckardt is liable (or whether perhaps they are both liable). He is therefore in a position similar to that of the plaintiff in *Tate v. Natural Gas Co.*, 18 P. R. 82. There the whole question is discussed by Meredith, C.J., and his opinion was approved by the Court of Appeal as being a proper application of Rule 192.

I think therefore that the motion fails and should be dismissed on three grounds:—

- (1) Because it is made too late.
- (2) Because defendants found no difficulty in pleading to the original statement of claim.
- (3) Because the amended statement of claim does not set up any new or different cause of action, and the joinder of the city and Eckardt seems right under the Rule and the authorities.

The costs will be to plaintiff as against the moving defendants in any event.

ANGLIN, J.

OCTOBER 30TH, 1906.

CHAMBERS.

WAGAR v. CARSCALLEN.

Pleading—Statement of Claim—Striking out—Embarrassment—Fraud—Setting out Facts and Circumstances—Anticipating Defence—Leave to Amend.

Appeal by defendants from order of Master in Chambers, ante 426, refusing to strike out part of the statement of claim.

C. A. Moss, for defendants.

J. H. Spence, for plaintiff.

ANGLIN, J., ordered that upon certain amendments being made by plaintiff the appeal should be dismissed; costs in the cause.

MACMAHON, J.

OCTOBER 30TH, 1906.

TRIAL.

MUSSEN v. WOODRUFF CO.

Sale of Goods—Specified Article of Machinery—Absence of Express Warranty—Implied Warranty—Evidence—Capacity of Machine.

Action for the balance of the price of machinery sold by plaintiff to defendants.

E. E. A. DuVernet and W. B. Milliken, for plaintiff.

C. A. Moss, for defendants.

MACMAHON, J.:—Plaintiff carries on business at Montreal as a dealer in railway, mining, and contractors' supplies. Defendants are a joint stock company, incorporated as the Woodruff-Robins Company, under the Ontario Companies Act, and carry on business in Toronto as constructing engineers and architects. By order in council of 6th December, 1905, the name was changed to "The Woodruff Company, Limited."

The defendants, after an interview with Mr. Chadwick, the agent of plaintiff, sent a written order to plaintiff at Montreal, as follows:

"W. H. C. Mussen & Co., Toronto, August 26th, 1905.
Montreal, Canada.

Please send to Toronto at Fairbanks switch, Bloor street west, G. T. R., 1 Smith mixer, number 2½, with Fairbanks-Morse gasoline engine hoisting drum attached, all on truck complete, for \$1,350 f.o.b. Montreal (confirming order telephoned by Samuel Shaw), and charge to the account of Woodruff-Robins Company, Ltd.

If it is not possible to make prompt delivery inform us.

Send all bills in duplicate.

Per C. L. Weismer."

Prior to the giving of this written order, Samuel Shaw, the manager of defendant company, telephoned to plaintiff to the same effect as is contained in the written order.

The "Smith mixer" is a machine patented in the United States, and is, under some arrangement with the patentees, manufactured by plaintiff, and is warranted to have a capacity of mixing 200 cubic yards in 10 hours. The Fairbanks-Morse gasoline engine is manufactured by the Fairbanks-Morse Company of Montreal, and with it no warranty was given.

The Smith mixer and the gasoline engine and hoisting drum attached thereto were shipped from Montreal on 8th September, 1905, and were invoiced at the price agreed upon, viz., \$1,350, which appears to have been made up as follows: mixer on trucks, \$750, gasoline engine, \$450, and hoisting drum, \$150. Plaintiff also sent a "clutch," charged as an "extra," at \$50, making the whole bill \$1,400.

It was not seriously contended that the Smith mixer did not perform its work satisfactorily, or that the engine supplied was not of ample power to run the mixer itself; but the contention of defendants is that, although they had ordered a Fairbanks-Morse gasoline engine, the one sent was insufficient for the purpose of running the mixer and hoisting a load at the same time, and that there was an implied warranty that it would do so.

The order being for a machine of a specified kind, viz., a Fairbanks-Morse gasoline engine with hoisting drum attached, without an express warranty, the defendants are liable, although the engine did not answer their purpose: *Chanter v. Hopkins*, 4 M. & W. 399; *Prideaux v. Bennett*, 1 C. B. N. S. 613.

The evidence, however, satisfies me that the engine was of sufficient capacity to run the mixer and hoist the load.

In a trade catalogue issued by the Smith Mixer Company, which (at p. 18) gives the capacities of the different sized mixers made by them, it is said that for 2½ mixer a ten-horse power engine is required for the running of the mixer alone; and at p. 13 the advantages and disadvantages of using gasoline power are fully pointed out. It is there stated that a gasoline engine, being a more complex apparatus than a steam engine, is more easily deranged, and the causes of trouble are harder to find; and that "in

experienced and intelligent hands the delays will be short and the advantages will overbalance the disadvantages, making it a more desirable outfit, particularly for scattered work requiring frequent moves, than a steam engine and boiler would be under those circumstances. But parties with inexperienced help are cautioned that they may look for trouble. No guarantee is furnished with gasoline engines but that of the makers. I must not be held responsible for them in any way."

The gasoline engine furnished by the plaintiffs was one of nine horse power. Mr. Mussen stated that his firm sells a mixer of their own, and that their mixers do not require a ten horse power engine for the double purpose of running the mixer and hoisting the load, and that was the reason of his ordering a nine horse power engine from the Fairbanks-Morse Company.

The defendants put up the mixer and engine immediately on its reaching Toronto, to be used in the erection of a building in Bloor street, the walls of which were to be of concrete 30 feet high. Difficulties (frequently found in starting new machinery) were experienced at first in running the engine because of some minor defects in the machinery, which were immediately remedied, and because Denice, who was running the engine, had not discovered a well in the machine which should have been kept filled with oil. These minor defects were immediately remedied, and after that, as explained in a letter from Chadwick to plaintiffs of 11th October, 1905, "the mixer and hoist seemed to please everybody on the job."

On one occasion the platform of the elevator, containing two barrows filled with concrete, was taken up so suddenly that it struck a beam, and the platform was slewed around and tilted over on its side. From the evidence it is clear that the young man (Porter) running the engine lost control of it, and the turning over of the platform was not attributable to any defect in the machinery, but to the fact that it was carried too far, because the power was not shut off in time. This incident demonstrated the lifting capacity of the engine, as the load was a heavy one. Complaint was also made that the drum became bound, and as a consequence there was difficulty in getting the hoisting apparatus in motion. The drum was one usually supplied

with the Fairbanks machine, and I find was of good workmanship, although some slight defects were found when hoisting was first commenced. . . .

[The learned Judge proceeded to summarize the evidence of some of the witnesses, and concluded.]

Having regard to the whole evidence, I reach the conclusion that the engine was capable of performing and did perform the work in a satisfactory manner.

Plaintiffs are entitled to recover the \$350, the balance due under the contract, and the \$8 for the mixer gear, with interest from the time of the shipment of the engine. They are not entitled to be paid for the clutch, as it was not ordered. While the clutch may have advantages, the engine is frequently kept running without the use of one.

Defendants must pay the costs of the action.

The counterclaim will be dismissed with costs.

BOYD, C.

OCTOBER 30TH, 1906.

TRIAL.

MCINTOSH v. LECKIE.

Contract—Exclusive Right for Term of Years to Enter on Land and Drift for Oil or Gas—Forfeiture Clause—Construction—Penalty—Payment—Time—Lease or License—Profit a Prendre—Specific Performance—Injunction—Subsequent Lease—Registry Laws—Improvements—Reference.

Action for a declaration that a certain lease or license to plaintiff to prospect for oil and gas upon certain land has not been forfeited, and to be admitted into possession, and to restrain the defendants from operating under a subsequent lease during plaintiff's term.

BOYD, C.:—Under the terms of the document called a lease, which is signed and sealed by defendant, plaintiff had the exclusive right to drift for petroleum and natural gas by entering upon the lands described for the term

of 5 years from 16th December, 1903. The rights of the parties depend upon the construction of an annulling clause . . . "This lease to be null and void and no longer binding on either party if a well is not commenced on the premises within 6 months from this date, unless the lessee shall thereafter pay yearly to lessor \$50 per year for delay."

The first 6 months expired on 16th June, 1904, and no well had been begun. Plaintiff wrote defendant on 13th June regretting delay and stating that he would hold the lease valid by making the yearly payment. This first payment of \$50 was made by cheque dated 8th July, which was received and cashed by defendant on 10th August, 1904, and a receipt therefor given on the back of the lease in these words: "Received from McIntosh \$50 on account of delay in beginning operations under within lease."

Early in August, 1905, plaintiff tendered the second yearly payment of \$50, which was refused by defendant. In his evidence defendant says that he thought the second payment should have been made before 16th June, 1905, and if it had been offered before that time he would have accepted it. Taking this view, that the lease had ceased to be binding on him, the defendant in chief made another lease for oil purposes to his co-defendants on 28th July, 1905.

Plaintiff's lease was registered in May, 1904, and, unless it has been avoided by what has occurred . . . it is evident that in the face of the Registry Act the defendants cannot claim to have the exclusive or indeed any right to the oil products during the term of plaintiff's lease.

The case was argued almost exclusively on American decisions; I have turned to those cited and others, but I do not think that many of those relied on for the defence are applicable to our system of jurisprudence. While papers such as the present are treated as dealing with profits à prendre and incorporeal hereditaments, yet the concluded agreement is regarded as subject to the flexible doctrine applied in cases of specific performance. And when circumstances of apparent hardship or of an unequal dealing are presented, the Court has held its hand and refused to enforce what appears to be the plain agreement of the parties.

There is no evidence of any unfair dealing or overreaching by the lessee; both parties understood what was being

done in granting this lease so-called, and defendant was willing to accept the penalty if it had been tendered in proper time. The contention thus seems to be reduced to a narrow issue—was defendant right in refusing to take the second \$50, tendered early in August, 1905?

The "lease" is for 5 years; a well is to be begun in 6 months; if not a yearly payment of \$50 is to be made for delay. If no well, the first payment is to be made "thereafter," that is, after the expiry of the 6 months, or after 16th June, 1904. Defendant put an interpretation upon the clause as to time when he received the first penalty payment on 10th August, 1904. The payment of \$50 is to be made "per year" and "yearly." The \$50 is for the whole of the first year in which default is made—it will cover from December, 1903, to December, 1904. Then \$50 is to be paid for the next year, not in advance, and, if not so provided for, then at any time during the year. The tender early in August, 1905, was within a year of the first payment, and it was within the second year of the lease, and might have been validly made at any time during that second year. I think defendant's position and contention is untenable, that this second payment should have been made before 16th June, 1905, and he acted unadvisedly in granting another lease while yet the first was current. As to the time of payment when something is to be paid per year or yearly, see *Nowery v. Connolly*, 29 U. C. R. 39; *Turner v. Allday*, Tyrw. & G. 819; *Lynch v. Versailles Fuel Gas Co.*, 165 Pa. St. 518.

Much argument was directed to the position that this document was a one-sided or unilateral contract of revocable nature at the option of the maker. I cannot take this view. The legal effect of this instrument (by whatever name it may be called) is more than a license; it confers an exclusive right to conduct operations on the land in order to drill for and produce the subterraneous oil or gas which may be there found during the period specified. It is a profit à prendre, an incorporeal right to be exercised in the land described: *Duke of Sutherland v. Heathcote*, [1892] 1 Ch. 473, 483. . . . *Gowan v. Christie*, L. R. 2 Sc. App. 273, 284 . . . *Funk v. Haldeman*, 53 Pa. St. 229, 243.

It is said in *Sharp v. Wright*, 28 Beav. 150, that when only a royalty rent is reserved and not a rent certain, there

is an implied obligation to begin work at once, and this doctrine has been invoked as giving a right to rescind. But it is excluded by the terms of the contract, which provides for the very case of failure or delay in beginning operations, and fixes the sum by way of penalty that shall then be paid per year.

The result is that plaintiff is still entitled to the rights given by the "lease" he holds, and defendants should be enjoined from operating for oil or gas in his territory during the currency of his term. He is entitled to possession for the purpose of experimenting or searching for oil and gas, and if he take the benefit of what has been done by defendants, or asks account of what profit they have made, it must be on terms of compensating them for the improvements, as to which there may be a reference to the local Master.

Costs of action to plaintiff.

OCTOBER 30TH, 1906.

DIVISIONAL COURT.

WOODRUFF CO. v. COLWELL.

Company—Parties to Action—Authority to Use Name—Solicitor—Meeting of Shareholders—Security for Costs.

Appeal by defendant from order of BOYD, C., ante 314, dismissing appeal by defendant from order of Master in Chambers, ante 302, dismissing motion to strike out the name of the company as plaintiffs, and for security for costs.

C. A. Moss, for defendant.

W. E. Middleton, for plaintiffs.

THE COURT (MEREDITH, C.J., MACMAHON, J., ANGLIN, J.), dismissed the appeal with costs to plaintiff in the cause.

OCTOBER 30TH, 1906.

DIVISIONAL COURT.

LONDON AND WESTERN TRUSTS CO v. LOSCOMBE.

Third Party Procedure—Action by Liquidator of Insolvent Company against Directors—Illegal Acts—Depleting Capital of Company—Relief over against Individual Shareholders in Respect of Payments to them—Rule 209—Scope of—Indemnity, Contribution, or Relief over.

Appeal by defendants Wortman and Durant from order of MABEE, J., ante 406, setting aside order of Master in Chambers giving directions as to trial of third party issues, and setting aside service of a third party notice upon Moorehouse and Watson, two shareholders in the Birkbeck Loan Co.

W. E. Middleton, for appellants.

C. A. Moss, for the third parties.

G. S. Gibbons, London, for plaintiffs.

THE COURT (MEREDITH, C.J., MACMAHON, J., ANGLIN, J.), upon counsel assenting, dismissed the appeal with costs of the third parties to be paid by the appellants, the liquidators undertaking, for the purpose of enabling the defendants to take such proceedings as they may be advised to be indemnified by third parties and other shareholders who have received dividends out of their share of the fund to be distributed, that there shall be no distribution made unless by leave of the Judge of the County Court of Middlesex, on notice to the defendants. As between the plaintiffs and defendants costs of the appeal to be costs in the cause.

CARTWRIGHT, MASTER.

NOVEMBER 1ST, 1906.

CHAMBERS.

OUTERBRIDGE v. OLIPHANT.

Discovery — Production of Documents — Privilege — Sale of Patent Rights—Letters before Sale.

Motion by defendant for order that plaintiff file a further affidavit on production.

R. W. Eyre, for defendant.

G. H. Kilmer, for plaintiff.

THE MASTER:—On the first return of the motion leave was given to plaintiff to file a further affidavit. This has been done, and sufficiently shews privilege as to all letters written by him to Harvey, under the decision in *Thomson v. Maryland Casualty Co.*, 11 O.L.R. 44, 7 O.W.R. 15. The only question remaining is as to the letters written by Harvey to plaintiff before the sale was made by defendant to plaintiff which has led to this action.

The statement of claim alleges that plaintiff bought on the faith of a representation by defendant that an application for a patent in the United States was pending, and in reliance on certain other representations made to him by defendant as to the nature and efficiency of the devices in question; that defendant knew that the application had been rejected; and that the alleged devices were not new, nor was defendant's assignor the first inventor.

The statement of defence alleges that plaintiff solicited defendant to allow him to purchase, and that defendant told him the patent had not been granted. It further states that the application for a patent is still pending before the United States patent office. Harvey's name is not mentioned in the pleadings. He is a partner of plaintiff, and it was through him that plaintiff was brought into communication with defendant. Harvey had seen Oliphant in Newfoundland, where the latter had gone to try and get his invention adopted by the government of the colony.

There were only two letters written by Harvey to plaintiff before the parties to the action met. The motion is therefore limited to these—which were dated 25th and 28th March. From plaintiff's depositions it would seem that he read such portions of these as had anything to do with Oliphant's invention.

It seems that defendant has got at least all he was entitled to, and more than he could have had as of right. The action is based on what took place between plaintiff and defendant after they met at Toronto. What Harvey wrote to plaintiff cannot be material, seeing that he is not even mentioned in the pleadings. If either side was relying on anything Harvey did before the bargain was made, a different case would be made.

The motion will therefore be dismissed. The costs will be in the cause, as plaintiff was allowed to supplement his affidavit on production.

BOYD, J.

NOVEMBER 1ST, 1906.

WEEKLY COURT.

DRIFFILL v. OUGH.

*Parties—Creditors' Action—Payment of Plaintiff's Claim—
Motion to Add another Creditor as Plaintiff—Practice—
Costs—Injunction.*

Motion by a creditor for an order substituting or adding him as a plaintiff, the original plaintiff, who instituted the action on behalf of himself and all other creditors of the defendant, having been paid his debt by defendant.

W. E. Middleton, for applicant.

A. E. Scanlon, for defendant.

BOYD, C.:—This is an action by one creditor on behalf of all other simple contract creditors to vacate a transfer of property alleged to be in fraud of creditors. The named plaintiff has been settled with by the defendant so far as to have received payment of the debt; no settlement has been made as to costs, and the plaintiff does not seek to dismiss the action, but is willing that another unpaid creditor should be added as a co-plaintiff.

According to the well settled practice in creditors' class suits, the creditor named as plaintiff is up to judgment master of the proceedings as dominus litis, and other creditors have before judgment the right to begin actions each for himself, because they cannot prevent the original creditor plaintiff from stopping or settling his action before judgment. This is very fully discussed by Wilson, C.J., in *McPherson v. Gedge*, 4 O. R. 256, and referred to in *Re Bitz and Village of New Hamburg*, 4 O. L. R. 639, 642, 1 O. W. R. 574, 690. No doubt, under the present practice, the Court would not sanction a separate action by

every creditor, but should take steps to ensure the prosecution of one for the benefit of all, as is pointed out by Kekewich, J., in *In re Alpha Co.*, [1903] 1 Ch. at p. 207. In the present instance, the course of the Court would be to allow the controversy to be settled as between the named plaintiff and the defendants, as was done in *Pembroke v. Topham*, 1 Beav. 318. And the proper course for the creditor now seeking to intervene would be to begin an independent action.

There are General Orders, such as 266 and 313, which give large discretionary power as to the substitution and addition of parties, but I incline to think that they do not cover, and were not intended to cover, such an application as the present. I therefore make no order to change parties, but give no costs of the motion, nor do I vacate the injunction as long as the present action is pending.

OSLER, J.A.

NOVEMBER 1ST, 1906.

C.A.—CHAMBERS.

RE GEROW AND TOWNSHIP OF PICKERING.

Appeal to Court of Appeal—Leave to Appeal—Order of Divisional Court Reversing Order Quashing Municipal By-law—Special Grounds—Passage of Local Option By-law Procured by Treating.

Motion by J. M. Gerow for leave to appeal to the Court of Appeal from order of a Divisional Court (ante 356) reversing order of MEREDITH, C.J., quashing by-law No. 871, being a local option by-law, of the township of Pickering, which was approved by the electors by a majority of 205.

J. E. Jones, for the applicant.

J. E. Farewell, K.C., and W. H. Blake, K.C., for the township corporation.

OSLER, J.:—The only ground on which the motion can be supported is that there are special reasons for treating the case as exceptional and allowing a further appeal: Judicature Act, sec. 76 (1) (g).

There was a majority of upwards of 200 in favour of the by-law in a total vote of 1,184.

There was no evidence that the passage of the by-law had been procured through or by means of any violation of the provisions of sec. 245 or 246 of the Municipal Act, i.e., bribery or undue influence, as defined by those sections, but the by-law was quashed on the ground that, having regard to the evidence and admissions of one Vanstone, and his avowed purpose and determination at all hazards to procure its passage, he had corrupted so widely by the expenditure of money in treating that there could not have been a free and fair expression of the will of the electors.

Vanstone was not in any sense an agent of those who were in good faith promoting and interested in the passage of the by-law. His object was a personal one—the satisfaction of a grudge he had against some hotel keeper in the township.

That he did work for the passage of the by-law, and did spend money liberally in treating those with whom he came into contact, may be conceded. So much, but no more, is shewn by his evidence. The case goes no further.

In the *Tamworth Case*, 10 M. & H. at p. 85, Willis, J., said: "If it had been established that there was throughout the borough, or any great part of it, general drunkenness (though not traceable to the respondent or any agent of his), if it produced obvious demoralization to an extent which must have influenced the election, I should have considered that a strong case had been made to be rebutted on the part of the respondent."

Nothing of this kind was shewn here, not even that a single voter had been intoxicated, and, acting upon the principle of the above case, the Court below, in reversing the judgment of the Judge of first instance, held that Vanstone's evidence was not sufficient to justify the conclusion that his conduct had so corrupted the electorate as to affect the honest vote in favour of the by-law.

The question is one of fact, and the Divisional Court and the Judge of first instance differ in their estimate of the value of the evidence on which its determination depends. I can see no reason, in the circumstances of this particular case, why the decision of the former should be reviewed by a further appeal. That a "prohibition" by-

law should be carried or defeated by bribery or should be defeated by general treating, I can understand, but that such a by-law should be carried by treating, unless to the extent of producing such a general condition of demoralization and drunkenness that the voters did not know what they were about, is hardly intelligible upon the ordinary processes of human reason.

The motion for leave is therefore refused with costs.

CARTWRIGHT, MASTER.

NOVEMBER 2ND, 1906.

CHAMBERS.

CARTER v. LEE.

*Discovery—Examination of Person for whose Benefit Action
Defended—Rule 440—Manager of Assignor Company.*

Action against the assignee for the benefit of creditors of an incorporated company, to recover the amount of a promissory note and cheque given by the company.

Plaintiff moved for an order allowing him to examine the manager of the company for discovery under Rule 440.

G. M. Clark, for plaintiff.

McCormack (Lennox & Lennox), for defendant.

THE MASTER:—Mr. Clark relied on *Garland v. Clarkson*, 9 O. L. R. 281, 5 O. W. R. 62. Rule 440, as interpreted by that case, seems to be entirely in point, unless there is a difference between an individual and a corporation.

The Rule says "A person for whose immediate benefit an action is prosecuted or defended shall be regarded as a party for the purpose of examination."

By the Interpretation Act, R. S. O. 1897 ch. 1, sec. 8, sub-sec. 13, it is declared that "the word 'person' shall include any body corporate," etc.

It would therefore seem that the order should go.

Costs in the cause.

CARTWRIGHT, MASTER.

NOVEMBER 2ND, 1906.

CHAMBERS.

APPLEYARD v. MULLIGAN.

Dismissal of Action—Motion to Dismiss for Failure of Plaintiff to Attend for Examination for Discovery—Illness of Plaintiff—Medical Evidence as to—Undertaking to Proceed to Trial—Excuse for Delay—Increased Security for Costs.

Motion by defendants to dismiss the action and strike out plaintiff's reply to defendants' counterclaim and allow judgment to be signed therefor, or that plaintiff furnish further security for costs, on the ground that plaintiff has not complied with an order of 29th September requiring her to attend for examination for discovery.

J. E. Jones, for defendants.

J. Bicknell, K.C., for plaintiff.

THE MASTER:—The history of the action is as follows. The writ issued 11th May, 1905. On 11th December, 1905, a motion was made to dismiss for default in filing affidavit on production, and also to change venue from Hamilton to Toronto. At the same time plaintiff moved for order to be allowed to plead to defendants' counterclaim.

On 6th April, 1906, a motion was made to dismiss for non-attendance of plaintiff for examination for discovery. This was dismissed, but plaintiff was ordered to go to trial at the next non-jury sittings.

On 29th September a similar motion was made, and plaintiff was again ordered to go to trial at the coming non-jury sittings at Ottawa, and submit to examination in the meantime as might be arranged. On 24th October the present motion was made; and enlarged until the 31st, and finally came up on that day, after the cross-examination of Dr. Hastings on his affidavit made in answer to the motion to dismiss.

On all of these three motions to dismiss there have been affidavits of plaintiff's medical attendants that she was and is unequal to the strain and worry of an examination.

On the present occasion, Dr. Hastings, one of the medical men, has been cross-examined, but without inducing him to recede from that opinion. He thinks that in two or three months she may perhaps be equal to the ordeal. Dr. McPhedran speaks of a month or six weeks. No doubt all this is very exasperating to defendants. This is intensified by the fact that these outstanding claims by and against plaintiff prevent the winding-up of the estate of the late Mr. St. Jacques, of the Russell House at Ottawa. With every disposition to relieve defendants and have the litigation ended, I cannot see, in the face of the material, what can be done. I do not see why defendants do not themselves give notice of trial for the January sittings. When this was suggested on the argument, it was said that defendants might in this way be embarrassed in regard to their counterclaim. But, if this is the only objection, it can easily be removed. Defendants may withdraw their counterclaim and make it the subject of a separate action. But it does not seem probable that the counterclaim would require plaintiff's examination to corroborate it.

The motion is dismissed and plaintiff is relieved from the undertaking to go to trial next week. If defendants wish to proceed they can give notice for the next sittings. Plaintiff is willing to give additional security. The costs of the motion will be in the cause, except those of cross-examination of Dr. Hastings, as to which there will be no costs. It was reasonable to take the step, but nothing was gained by it.

MACMAHON, J.

NOVEMBER 3RD, 1906.

TRIAL.

MILLAR v. BECK.

Contract—Purchase of Timber Limits—Agreement to Share Profits—Denial of Signature—Action to Perpetuate Testimony and Enforce Agreement—Assignee of Part of Claim—Purchase for Benefit of Incorporated Company—Parties—Amendment—Declaratory Judgment.

The statement of claim alleged: (1) that on 9th December, 1903, defendant purchased, at an Ontario govern-

ment sale, 8 timber berths for about \$350,000; (2) that defendant entered into an agreement with one Peter Ryan for the transfer to the latter of a one-half interest in the profits to be derived from the purchase and sale of the berth, as follows: "For and in consideration of your agreement to share equally with you in the net profits from the lease of the Blood Indian reserve, I agree to share and share alike with you any profits derived from the purchase and sale of the timber berths bought by me at the sale on 9th December, 1903, or by any one on my account or on account of the C. Beck Manufacturing Co. Limited, save and except such berths to be for the use and operations of the company;" dated 15th December, 1903, and purporting to be signed "C. Beck"—the defendant—and with a seal attached; (3) that Ryan on 4th December, 1905, in consideration of \$2,000, sold and transferred to plaintiff a one-fourth interest in the above agreement and a one-fourth share of the profits to be derived from the same; (4) that since the transfer defendant had denied the genuineness of his signature to the agreement, and asserted that it was a forgery.

Plaintiff claimed: (1) a declaration that the name of defendant subscribed to the agreement was in defendant's handwriting and that the agreement was valid and binding on defendant; (2) a declaration of plaintiff's rights and interests in the agreement, and enforcement thereof.

The defendant in his statement of defence: (1) denied the making of the agreement; (3) alleged that if he ever entered into the agreement it was contrary to public policy and void; (4) alleged that he received no consideration; (5) alleged that Ryan was the auctioneer employed for the purpose of conducting the sale of the berths, and was thereby disqualified from making any agreement with defendant for the sharing of the net profits to be derived from the purchase thereof; (6) alleged that defendant, as Ryan well knew, acquired the berths as the agent for and on behalf of the C. Beck Manufacturing Co., and the berths were acquired for the purpose of the business of that company.

E. F. B. Johnston, K.C., and W. N. Ferguson, for plaintiff.

J. Bicknell, K.C., for defendant.

MACMAHON, J.:—The declaration first prayed for would, in effect, be making the action one simply “for the perpetuation of testimony,” and where that is sought the action should have been commenced solely for that purpose.

. . .

[Reference to *Angell v. Angell*, 1 Sim. & Stu. 83; *Campbell v. Earl of Dalhousie*, L. R. 1 H. L. Sc. at p. 464.]

I have, therefore, to consider whether plaintiff can at once bring an action to recover a share of the profits which he alleges would arise from a sale of the timber berths mentioned in the agreement. Defendant said all the berths bought by him now belong to the C. Beck Manufacturing Co., and the berths are now standing in the company's name in the books of the Crown Lands Department. There therefore does not exist any obstacle to the immediate prosecution by plaintiff of his suit for the recovery of any profits to which he may be entitled under the agreement entered into by defendant.

I took evidence as to the alleged forgery of defendant's signature to the agreement, and found that the signature was in defendant's handwriting; that finding may stand, but it can bind only the parties in this action as as present constituted. . . .

Then . . . a declaratory judgment is asked as to the rights and interests of plaintiff under the agreement set out in the 2nd paragraph of the statement of claim.

The Court may make binding declarations of right, whether consequential relief is sought or not: Judicature Act, 57 Vict. ch. 12, sec. 57, sub-sec. 5. But a declaratory judgment should be pronounced only in case where it is necessary and proper so to do. It appears on the face of the agreement . . . that some of the timber berths were purchased on account of the C. Beck Manufacturing Co., and for their use—defendant when in the box said that they were all purchased for the company; and until the company are made parties to the litigation, no declaration as to the rights and interests of plaintiff could be made. And, as plaintiff is entitled only to a one-fourth share of the profits which would be payable to Ryan under the agreement, Ryan is a necessary party plaintiff to the action.

It appears to me that no case has been presented in which I could properly exercise the power to make a declaratory judgment. No consequential relief is sought, nor could it be asked on the record as at present framed. I refer to Thomson v. Cushing, 30 O. R. 123; Stewart v. Guibord, 6 O. L. R. 262, 2 O. W. R. 168, 554; Bunnell v. Gordon, 20 O. R. 281.

Plaintiff should have leave to amend his statement of claim, as advised, within one month, and I will hear counsel as to the terms on which amendment should be made.

NOVEMBER 3RD, 1906.

C. A.

PRESTON v. TORONTO R. W. CO.

*Street Railways—Injury to Person Bicycling on Highway—
Crossing behind Car — Approach of Car from Opposite
Direction — Failure to Sound Gong — Negligence — Con-
tributory Negligence—Nonsuit—New Trial.*

Appeal by defendants from order of a Divisional Court, 6 O. W. R. 786, 11 O. L. R. 56, setting aside a nonsuit entered by BOYD, C., at the trial at Toronto, and directing a new trial, or a verdict for plaintiff for \$1,000, in an action brought by Ernest E. Preston, a telegraph messenger, for injury caused to him by one of defendants' cars running on Yonge street, in the city of Toronto, by the alleged negligence of defendants' servants in charge of the car.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, J.J.A.

W. Nesbitt, K.C., and D. L. McCarthy, for defendants.

Shirley Denison, for plaintiff.

Moss, C.J.O.:—In my opinion, this appeal fails, and should be dismissed.

Plaintiff was lawfully using the part of the highway on which he was proceeding, following the south-bound car down Yonge street towards his destination. He was also entitled to use the part of the highway between the tracks on the east side, provided he did not unnecessarily interfere with the traffic upon that part, or knowingly or recklessly expose himself to imminent and apparent danger by going upon it. According to the evidence, he was following the south-bound car, keeping at a distance of 15 or 20 feet behind it, until it came to a standstill on the north side of Wellington street. As it did not move on by the time he had arrived at a distance of about 4 feet from it, it became necessary for him to avoid it by turning either to the right or left. His way to the right was obstructed by a ridge of snow at the west side of the track about 8 or 10 inches in height. Deeming it impossible to force his bicycle over this obstruction, he looked to the left or east side of the car. He saw nothing and heard no sound to indicate that there was any approaching car or other traffic to obstruct his way on the east track, and he turned to go upon it. As a matter of fact, there was a car crossing Wellington street from the south, going at a rapid pace, and it was within 10 feet of him when he came on the devil strip. He made an effort to avoid a collision by turning straight across the track and throwing himself off, but failed, and was struck and injured.

The Chancellor . . . did not deal with the question whether there was evidence to submit to the jury of negligence on the part of defendants—except on one point, to be noticed presently—but held that plaintiff should not have turned in upon the east track, but should have turned to the right, and because he did not do so, but, instead, turned to the left, he was guilty of negligence which occasioned the injury. He was also of opinion that there was no obligation on the part of defendants, or their motorman, to sound the gong when crossing the street or approaching another car. But in this he overlooked the testimony of defendants' roadmaster, that there is a rule requiring the ringing of the gong when passing cars. The omission to give the customary signal was a factor in support of the

charge of negligence, which should not have been withdrawn from the jury: per Hagarty, C.J.O., in *Beckett v. Grand Trunk R. W. Co.*, 13 A. R. at p. 183.

There was, in my opinion, evidence upon which the jury might reasonably find that the gong was not sounded, and that the car was moving at a rapid rate. Then the question whether plaintiff had acted reasonably under the circumstances, or whether he had, by his own negligence and want of proper care and caution, either brought the accident upon himself, or contributed to it, was for the jury. I am not prepared to hold, nor do I think the authorities compel me to hold, that it is per se negligent, reckless, or unreasonable conduct for the rider of a bicycle, riding between the rails of one track of the railway, to turn upon the space between the rails of the other track, when he finds his way on the first obstructed. It must be for the jury to decide whether, in all the circumstances, he acted in a reasonable manner in doing so. And, in my judgment, the view taken by the Divisional Court was right and should be affirmed.

OSLER, J.A., concurred, for reasons giving in writing, in which he referred to *Dublin, Wicklow, and Wexford R. W. Co. v. Slattery*, 3 App. Cas. at p. 1183; *Basso v. Grand Trunk R. W. Co.*, 6 O. W. R. 893; *Skelton v. London and North Western R. W. Co.*, L. R. 2 C. P. 631.

GARROW and MACLAREN, JJ.A., also concurred.

MEREDITH, J.A., dissented, for reasons giving in writing. He was of opinion that the Chancellor was right in withdrawing the case from the jury upon the ground of the plaintiff's own negligence or recklessness, referring to *Logan v. London Street R. W. Co.*, not reported: *Phillips v. Grand Trunk R. W. Co.*, 1 O. L. R. 28; *Gallinger v. Toronto R. W. Co.*, 8 O. L. R. 698, 4 O. W. R. 522. Upon the question whether there was any reasonable evidence of negligence on the part of defendants causing plaintiff's injury, he expressed no opinion.

Appeal dismissed with costs; MEREDITH, J.A., dissenting.

NOVEMBER 3RD, 1906.

C.A.

KING v. TORONTO R. W. CO.

*Street Railways—Death of Person Driving Across Tracks—
Collision with Motor-car—Negligence — Recklessness of
Deceased — Findings of Jury — Evidence to Support —
New Trial.*

Appeal by defendants from judgment of MEREDITH, C.J., upon the findings of a jury, in favour of plaintiffs for \$4,500 damages.

The action was brought under the Fatal Accidents Act, by Mary King and her daughter Ethel King, to recover damages for the death of the husband and father of the respective plaintiffs, who was killed, as alleged, by the negligent management of one of defendants' motor-cars.

It appeared that about 7 o'clock in the morning of 21st December, 1904, the deceased was engaged in driving a bread delivery van in an easterly direction along Adelaide street, in the city of Toronto. While crossing Yonge street, the van came into collision with a car of defendants, going north on the easterly track of their railway. The van was struck about the middle, pushed along for a short distance, and the deceased was thrown out and killed by the fall. The car was said to have been going at a moderate rate of speed—5 miles an hour—between King street and Adelaide street, but when it arrived at a point between 2 and 3 car-lengths from the south side of Adelaide street, its speed was slightly accelerated. The deceased, who was driving at the rate of 8 or 9 miles an hour, drove his van directly in front of the car, which was in full view of any one in his situation from a point some distance west of the west side of Yonge street, apparently without looking round or attempting to turn his vehicle.

The usual contest was waged over the questions of defendants' negligence and the contributory negligence of deceased, and whether the motorman had been negligent in not observing the approach of the van before increasing the speed of the car as it neared Adelaide street.

The questions submitted to the jury and their answers were as follows:—

Q. 1. Was the injury to the deceased caused by the negligence of (1) the motorman alone? A. Yes.

(2) The deceased alone? A. No.

Q. 2. Was it due to the negligence of both of them? A. No.

Q. 3. In what did any negligence which you find consist? A. We find the motorman negligent, after slowing up at Adelaide street, in again putting on power at this point without observing the approach of deceased's waggon.

Q. 4. Could the motorman, after the danger of collision being imminent became apparent to him, have avoided the accident by the exercise of reasonable care on his part? A. Yes.

Q. 5. Ought the motorman, if he had exercised reasonable care, to have apprehended sooner than he did that a collision was imminent? A. Yes.

Q. 6. If you answer yes to question 5, could the motorman, when, in your opinion, he should have apprehended that a collision was imminent, have avoided the accident by the exercise of reasonable care on his part? A. Yes.

Q. 7. Damages? A. The widow, \$3,000; the daughter, \$1,500.

It was said that the trial Judge was asked but declined to submit to the jury the further question whether the deceased could by the exercise of reasonable care have avoided the collision.

Judgment was directed to be entered for plaintiffs in accordance with these findings, the trial Judge being of opinion that there was some evidence of negligence on the part of the motorman in putting on power when he came to Adelaide street, though he said that he would not himself have found for plaintiffs had he been trying the case without a jury.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

W. Nesbitt, K.C., and D. L. McCarthy, for defendants, contended that the action ought to have been dismissed at the trial, on the ground that there was no evidence of negligence on the part of the motorman, but, on the contrary, the accident was proved to have been due to the deceased van-driver's own negligence, and that after it became apparent that a collision was imminent, the motorman did everything in his power to stop the car. They asked also for a new trial, on the grounds that the question above mentioned ought to have been submitted to the jury, and that the damages were excessive.

A. J. Russell Snow, for plaintiffs.

MEREDITH, J.A.:—Plaintiffs do not suffer from any lack of findings of the jury, or any uncertainty as to the character or purpose of such findings; they are very clear and more than enough to support the judgment directed to be entered in their favour. . . .

The case is a plain one and the facts simple; and there is little, if any, contradictory testimony.

No reasonable and unprejudiced man could say that the deceased acted with ordinary care, or that the accident would have happened had he taken such care. He knew the locality well; he knew that he was about to cross the tracks of the railway in the very heart of the city, where cars were constantly passing up and down, and that it was a busy hour of the morning, when many were hurrying to their work; and that he was in a bread waggon, which much obscured his view. In these circumstances he drove rapidly along until his waggon had almost, if not quite, crossed the down track, and was upon the up track, when it was struck by a car moving on the up track, and he was thrown down upon the pavement, falling upon it in such a manner as to cause of his death.

When approaching the place of the accident, the car was going at less speed than the waggon, and there was nothing to have prevented the deceased seeing the car, except in so far as the construction of the cover of his waggon may have done so. He therefore must have seen and risked the danger, or else have neglected to look, and so, with perhaps as great fault, also risked the danger, taking his chances of injury or death. The facts of this case make con-

cise logic of this character applicable and unanswerable, though it may be found fault with—as it was—in cases in which other circumstances intervene, or as a rule of general application. It may be said that the man may have seen the car, and not unreasonably though mistakenly, have thought that it was about to stop, or that if its speed were not increased, he would have time to cross; but there is nothing in the evidence to indicate this, and it was a want of care to risk hurt or loss on conjecture as to what the driver of the car would do.

There was, therefore, no reasonable evidence to support the finding of the jury to the effect that the deceased was not guilty of any negligence.

There was evidence to go to the jury on the question of negligence on the part of the driver of the car in not seeing the deceased approaching, and the jury have found defendants guilty of negligence in this respect.

There being, then, negligence on both sides, plaintiffs' action fails, unless, in the circumstances of the case, the driver of the car became aware of the man's danger, and notwithstanding the latter's negligence, might, by the exercise of ordinary care, have avoided the accident.

The trial Judge was of opinion that there was no evidence to go to the jury upon the question, but submitted it to them, and they have very plainly found it in plaintiffs' favour. I am not quite able to agree in that opinion; but the whole of the findings of the jury, including the assessment of the damages, satisfy me that plaintiffs had not a fair and unprejudiced trial, and that the judgment and verdict should be set aside, and a new trial awarded.

MOSS, C.J.O., and MACLAREN, J.A., concurred in the result.

OSLER, J.A., was of opinion for reasons stated in writing that the appeal should be allowed and the action dismissed.

GARROW, J.A., agreed with OSLER, J.A., for reasons also given in writing.

Judgment set aside and new trial directed; costs of the former trial to be costs in the action; costs of the appeal to be costs to defendants in any event of the action; OSLER and GARROW, JJ.A., dissenting.

NOVEMBER 3RD, 1906.

C.A.

LESLIE v. TOWNSHIP OF MALAHIDE.

Estoppel—Accounts of Municipal Treasurer—Giving Credit for Balance Due to Municipality from Estate of Former Treasurer—Recovery from Municipality of Moneys Paid by Treasurer out of his own Pocket—Statements of Account—Audit—Dividends on Insolvent Estate of Former Treasurer—Neglect to Proceed against Sureties—Laches—Inquiry as to Loss—Reference.

Appeal by defendants from judgment of TEETZEL, J., in favour of plaintiff, in an action tried without a jury. Action to recover from the township corporation \$4,349.65, the balance of an amount said to have been advanced by plaintiff for use of defendants when plaintiff was township treasurer. Plaintiff, on assuming the duties of treasurer, entered as received the amount in the hands of the former treasurer, but the latter died, and his estate proved to be insolvent, and plaintiff received only a part of the amount due, and used his own money for township purposes.

W. R. Riddell, K. C., and E. A. Miller, Aylmer, for defendants.

G. C. Gibbons, K.C., and W. E. Stevens, Aylmer, for plaintiff.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, JJ.A.), was delivered by

OSLER, J.A.:— . . . When defendants on 20th February, 1899, confirmed the appointment of plaintiff as treasurer "pro tem.," and gave him the order on "the treasurer of the township of Malahide" for \$5,799.52, the balance in the hands of Murray, their former treasurer, it was known to all parties that the treasurer was dead, and, therefore, that it could only be obtained from his estate in due course of administration. The order (so to describe it) was probably given and taken as a convenient way, or deemed to be

such, of enabling plaintiff to obtain payment, as the estate was then supposed to be solvent.

In his accounts with the township plaintiff has nowhere debited himself with the receipt of the amount of the order after the confirmation of his appointment as treasurer "pro tem." on 20th February (for he was not appointed treasurer until 8th April.) He has merely carried forward in the old cash book the balance shewn on a previous page to be in the hands of the former treasurer, making no reference to the order. His statement of receipts and expenditure for the year ending 31st December, 1899, was prepared and audited as if there had been no change in the treasurer-ship, commencing with balance on hand on 1st January of \$6,028.28, and ending with balance to the credit of the township of \$4,228.77. Plaintiff had, however, believing the estate of the deceased treasurer to be solvent, and anticipating an early liquidation of the debt due therefrom to defendants, gone on paying the orders given by them from time to time, on the same assumption, out of his own moneys, and, although long before the end of 1899 the estate proved to be insolvent, he continued from year to year thereafter to pursue the same course, rendering his yearly statements of receipts and expenditure, which were duly audited, shewing balances in favour of the township which were non-existent, except upon the footing of his having actually received the whole amount of the late treasurer's indebtedness, an assumption which the most casual examination of his cash book by the auditors must have shewn to be unfounded. During 1899 he proved the debt against Murray's estate in the name, though, as it is said, without the knowledge, of the council, and received thereon dividends, two in 1899 and a third in March, 1901, amounting in all to \$1,481.56, which he credited, though not in the books of the township, against his advances. He did not, however, bring the facts directly to the notice of the council, or make any claim against the township, until January, 1905. Except the dividends referred to, nothing was recovered from Murray's estate, and, unless it may be inferred, as perhaps it ought to be . . . that the council knew from their clerk, to whom plaintiff had communicated it, that the order had not been paid, and that their claim against Murray's estate had been filed, they remained in ignorance of the fact until shortly before action brought.

Plaintiff's only explanation is that having carried forward in the cash book, as continued by him, to the credit of the township, the amount due by Murray, and having rendered his statement of receipts and expenditure for 1899, and having allowed this and subsequent statements to be audited as if he had actually received it, he conceived the impression that he had made the debt his own, and had lost the money.

The question is whether, in these circumstances, he is now entitled to recover from the township the moneys so paid by him; and on the whole, subject to the inquiry hereafter directed, I think that he is.

The case is not one for the application of the rule as to voluntary payments, and, indeed, a defence on that ground was but faintly, if at all, pressed.

The grounds chiefly relied on were that plaintiff had agreed to accept the order of 20th February as cash, and to account for it on that footing, or that by his conduct and silence, defendants had lost certain remedies against the estate of their former treasurer and his sureties.

It is clear upon the evidence that the first of these grounds of defence is not made out, and that the finding of the trial Judge in that respect cannot be disturbed. There was no understanding or agreement between the parties that plaintiff should charge himself with the amount of the order, nor is there any apparent reason why he should have done so.

The business between the parties, therefore, began by the payment of orders given upon him by defendants for the payment of sums which they could have had no reasonable ground for supposing that he had then in his hands. I can see no reason why, after the end of his first year of office, he could not have recovered for the advances made during that year, notwithstanding the delivery of the statement of receipts and expenditure, and their audit; and, in the absence of any direct representation that the order of February had been actually paid, I think the advances during the subsequent years should be treated on the same footing, as they were all made upon orders given from time to time by defendants in respect of the ordinary debts and expenditures of the township, which must have been incurred and paid in any case. Defendants have had the

benefit of these payments, and have incurred, so far as appears, no debts or liabilities and have entered upon no expenditures or undertakings which they could not have incurred or entered upon if they had received the clearest notice at the earliest moment that their late treasurer's estate was insolvent. For these reasons, I think the case distinguishable from the class of cases of which *Cave v. Mills*, 7 H. & N. , is an example. *London Chartered Bank v. McMillan*, [1892] A. C. , may also be referred to.

Defendants have, however, just reason to urge that they may have been prejudiced by the laches of plaintiff in respect of what might have been recovered from Murray's estate or from his sureties. This was a matter of defence not raised by the pleadings, and, though opened at the trial, it was manifest that neither party was prepared to deal with it there in a satisfactory manner. The trial Judge, therefore, while giving judgment in favour of plaintiff for the amount of his claim, directed that it should be without prejudice to any action defendants might afterwards be advised to bring against plaintiff for damages in respect either of things done or omitted by plaintiff in proving the claim against Murray's estate, or by reason of their rights against the late treasurer's sureties having been impaired or lost through the act or delay of plaintiff.

As the case was presented at the trial, this was probably the full measure of relief to which defendants were entitled.

It appears to us, however, on full consideration, that it would be more satisfactory if the rights of all parties in respect of these matters were disposed of in the present action, so that plaintiff shall have judgment for, if anything, no more than upon the investigation of the claims on both sides shall appear to be due to him. The amount of plaintiff's claim, therefore, being taken to be as found at the trial, it should be referred to the Master at St. Thomas to make the inquiries mentioned in the 3rd paragraph of the judgment, and to report whether and to what extent any damage or loss has resulted to defendants in respect of the matters above referred to, and in respect of any payment which it may appear plaintiff has improperly made to the representatives of the deceased treasurer's estate; reserving further directions and costs, except the costs

of the appeal, which must be costs to the respondent in any event of the cause.

NOVEMBER 3RD, 1906.

C.A.

McCARTHY v. KILGOUR.

Master and Servant—Injury to Servant—Negligence—Defect in Machine—Findings of Jury.

Appeal by defendant from order of a Divisional Court, 7 O. W. R. 44, dismissing appeal by defendant from judgment of ANGLIN, J., upon the findings of a jury, in favour of plaintiff in an action at common law and under the Workmen's Compensation Act, to recover damages for injuries sustained by plaintiff while employed by defendant in working at a die press or cutter called "Colt's Armoury Press." Plaintiff had several of his fingers cut off, owing, as alleged, to defects in the construction or condition of the machine. The jury found that the machine was defective "by reason of the imperfect working of the lever;" that the defect was known to defendant's foreman, and was the cause of the injury; that plaintiff was not guilty of contributory negligence; and they assessed the damages at \$1,500.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

E. E. A. DuVernet and R. H. Greer, for defendant.

L. V. McBrady, K.C., for plaintiff.

OSLER, J.A.:—Upon the evidence it seems clear that there could be no recovery at common law. No negligence could, in the circumstances, be imputed to defendant by reason of the absence of a guard or of a clutch or notch or some other device to arrest the lever at "neutral" or dead centre. As to the former, the finding of the jury in answer to the 7th question expressly exonerates defendant, while as to both the evidence is conclusive that there was

no machine on the market or known to the trade in which such contrivances or any substitute for them were used or applied. The right of plaintiff to recover must rest, therefore, upon the Workmen's Compensation Act, and upon proof of some defect in the condition of the machine arising from or not discovered or remedied owing to the negligence of defendant or of some one intrusted by him with the duty of seeing that the condition of the machine was proper: secs. 3 (1), 6 (1). The answer to the 3rd question exonerates defendant personally from any breach of duty in this respect, but says that the defect was known or should have been known to his foreman. Answers to questions 1 and 2 find that the machine was defective in respect of the imperfect working of the lever, but what particular defect of those relied on by plaintiff is wholly matter of conjecture. The jury may have meant to refer to the absence of a clutch or notch, or to a looseness in the working of the lever at some particular point in its play, and both of these matters, as well as the absence of a guard, were left to them by the Judge to pass upon in dealing with the fact of negligence. If the absence of the notch is meant, that would not support a verdict, for the reasons already mentioned. If the looseness of the lever, the jury have not said so, and this uncertainty in their finding, if there were nothing else in the case, would call for the new trial which Britton, J., differing from the other members of the Court, thought should be granted. Even if looseness in the working of the lever be assumed as what the jury meant by saying that it worked imperfectly, no one can say from the evidence that this was not the looseness which ought to exist and was proper where the lever was not being moved for the purpose of engaging the friction clutch where it ought to work, and did work, stiffly. The jury, it is true, had a view of the warehouse, but nothing in the case suggests that the lever then failed to work as it ought to do.

But, upon an examination of the whole of the evidence, I am quite satisfied that there is nothing on which the jury could properly have found neglect on the part of the foreman—no evidence of his omission to perform any duty, whether of inspection or otherwise, which he ought to have exercised in respect of this machine, or of knowledge or even suspicion that there was anything amiss with it . . . The case was left to them generally to say whether, as re-

gards whatever they might find to be the defect, the foreman knew or should have known of it. Some default on his part should have been proved to warrant an answer in the affirmative, and I have been unable to discover any. No complaint had ever been made of the machine or of its having acted in an unexpected or irregular manner. No accident had ever happened to any one while using it, and there is a considerable body of expert testimony that there was nothing amiss in its manner of working, and no defect to be remedied.

The evidence, in truth, points very strongly to the conclusion that plaintiff was the cause of his own injury by giving the lever the push which he admits he gave it, but which was unfortunately so forcibly applied as to send it over neutral or dead-centre, and thus start the machine.

In my opinion, plaintiff's case fails altogether, and the appeal should be allowed and the action dismissed.

MEREDITH, J.A., gave reasons in writing for the same conclusion.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., concurred in the result.

Appeal allowed and action dismissed with costs, if costs are asked.

NOVEMBER 3RD, 1906.

C.A.

LOVELL v. LOVELL.

Husband and Wife—Alimony—Cruelty not Amounting to Personal Violence—Threats—Wife Leaving Husband—Justification—Findings of Trial Judge—Appeal.

Appeal by defendant from order of a Divisional Court, 7 O. W. R. 303, 11 O. L. R. 547, affirming judgment of BOYD, C., 6 O. W. R. 621, 11 O. L. R. 547, declaring plaintiff entitled to alimony.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

G. H. Watson, K.C., and W. W. Denison, for defendant.

J. King, K.C., for plaintiff.

MOSS, C.J.O.:— . . . The question is whether plaintiff has established a case of cruelty, apart from actual violence or adultery, sufficient to entitle her to a judgment for alimony.

A great deal of testimony has been taken, and the greater part of the conjugal life of the parties has been exposed. The Chancellor, who tried the case, . . . after hearing the evidence, and after, as he says, the most anxious and serious consideration, came to the conclusion that there had been such a course of conduct on the part of defendant as to justify plaintiff in refusing to live longer with him, because to continue to do so would be permanently to injure and affect her bodily health and seriously endanger her mental balance. A Divisional Court affirmed the decision, the late Mr. Justice Street dissenting, and defendant has appealed.

Throughout the case it has been strenuously argued for defendant that according to the law of England there can be no cruelty sufficient to entitle a wife to a divorce and alimony as incident thereto, unless there is shewn danger to life, limb, or health, bodily or mentally, or a reasonable apprehension of it, and that the danger must be founded on some physical facts such as actual violence or threats of violence leading to an apprehension that, if continued, danger to life, limb, or health will ensue, or to an apprehension that the fear of the continuance of such a course of conduct will affect the health and bring about serious bodily and mental suffering to such an extent as to incapacitate the spouse so affected for the performance of the duties of the marital state. But the decisions, many of which have been referred to and discussed in the judgments in the Courts below, do not so confine the definition of legal cruelty. And while it is recognized that violence and personal danger are far the most common ground, the cases do not rest there. They shew that in a proper case relief will be given where there is no personal violence and no threats of it, but where there is conduct of such a kind as to under-

mine health. No doubt, such cases are comparatively rare, and should be admitted with great caution. But that the law recognizes them and is prepared to give relief where the facts justify it, is beyond question. It is said that by the decision arrived at in *Russell v. Russell*, [1897] P. 315, and [1899] A. C. 395, the definition of legal cruelty has been limited to cases of violence, actual or threatened, and the mental effects thereby produced. The actual decision in that case was that the conduct charged against Earl Russell by his wife, odious and abominable though it was, had not, in fact, affected her bodily or mental health. But the absence of this element even was not, in the opinion of Rigby, L.J., in the Court of Appeal, and Halsbury, L.C., and Lords Hobhouse, Ashbourne, and Morris, in the House of Lords, a sufficient reason for withholding relief. And the speeches of the majority of the Lords do not shew an affirmation of the proposition that the test of injury to health, or a reasonable apprehension thereof, is confined to fears occasioned by actual violence, bodily hurt, or threats thereof. This is manifest from the observations of Lord Shand, at p. 463, and of Lord Davey, at p. 465. The case is not to be taken as overruling the numerous cases preceding it which recognize the propriety of relief in cases of cruelty not depending on violence actual or threatened.

The present case, then, resolves itself into a question on the facts, whether plaintiff has shewn that defendant has subjected her to treatment likely to produce, and which did produce, physical illness and mental distress of a nature calculated permanently to affect her bodily health and endanger her reason—and that there is a reasonable apprehension that the same state of things would continue.

It is shewn that at the time of the marriage plaintiff, though somewhat delicate and predisposed to weakness of the back, was otherwise in good health and of a cheerful, pleasant disposition. It is shewn that up to the time when they gave up housekeeping and went to live at a boarding house, although there had been differences between them and some indefensible acts on the part of defendant—such as the introduction of his mother and sister into the household in violation of his solemn promise not to do so, his insistence upon the separation of plaintiff and her child in the summer of 1902, while she was at the Island, his re-

fusal to permit plaintiff to take the child with her on a contemplated trip to the south, thereby putting an end to the trip, his refusal to engage a nurse for plaintiff and her child at a time when both were ill, and threatening to remove the child from her because she was unfit to be intrusted with his care—they had lived on comparatively affectionate terms. At the time when plaintiff left the boarding house on 23rd January, 1904, and went to her father's house, the evidence shews her to have been in a very serious condition both physically and mentally. She was weak and ill, nervous and depressed, so much so that her father and others feared that her mind was going. Her father says she was much worse, more excited, in January, 1904, than in May, 1903; she was almost a wreck; she could hardly stand alone; he could see that her mind was going, and that her constitution was breaking down. And her mother and sister observed the same things, and shared his apprehensions. That their fears were not imaginary or unfounded appears from the testimony of Dr. Musgrave, who describes her condition at the time when she went to her father's house. He says she was in a very nervous, almost broken down condition, physically and mentally—chiefly mental in nervous system. Harshness or ill-treatment in her case would so affect her system as to lead to a break-down finally, and she was afraid of defendant and in dread of living alone with him. And when, while in this state of collapse, she was suddenly informed by defendant that he had, without consultation with her, rented a house, and that he desired her immediately to get ready to go there with him, but that none of her friends were to be permitted to go to see her, she felt afraid to go, and told him so. He did not endeavour to reassure her or to remove her fears, but repeated his command.

There can be no doubt that her health, physical and mental, was in a very critical state, and that a continuance of the then conditions would have led, almost inevitably, to the most serious if not fatal consequences.

To what causes is this marked and serious change to be attributed?

The evidence must be regarded as a whole. The nature of the case does not permit of a separation of the incidents and an inquiry whether, taken singly, there is conduct

amounting to cruelty. Rather the questions are whether upon the whole of the facts shewn there is not disclosed that defendant's conduct was responsible for plaintiff's condition, and whether it was not reasonable to conclude that it was likely to be continued, and whether, if continued, it was not altogether probable that it would entail the gravest consequences to plaintiff.

A perusal of the testimony leads to the conviction that the Chancellor reached a proper conclusion as regards these questions. Testimony outside of that of plaintiff's family shews that after the removal to the boarding house there was a marked change in defendant's attitude towards and treatment of plaintiff, and of this he attempts no explanation, but contents himself with general denials. These, however, cannot be accepted, in the face of independent testimony supporting plaintiff's statements. There is a marked contrast between plaintiff's manner of testifying and that of defendant, which justified the Chancellor in accepting her testimony upon any disputed point in preference to defendant's. One cannot fail to note the candid and unguarded way in which plaintiff gave her evidence, speaking without any reserve or apparent care as to its effect, in contrast to defendant's studied, evasive, and elusive methods, so that, even reading it, one can well understand how disinclined the Chancellor on hearing it must have been to attach weight to it, much less to accept it as against plaintiff's, corroborated as the latter was in so many material particulars.

Plaintiff's conduct in making notes of some of defendant's sayings and doings, has been commented on, but this, though a practice not to be commended, as she candidly admits, is satisfactorily explained. Defendant had made use of language implying that she was unfit to have the care of her child, and claimed the right, and threatened to exercise it, of taking him from her custody and care. She was afraid he would attempt to carry out his threat, and she did not know what he would do, and she noted what he said and did in order to prepare in case he took action. His frequent hints and threats concerning the child and his removal from her custody were a great source of disquietude and unhappiness to her, and it undoubtedly preyed upon her mind, and had its part in bringing about

the final unhappy condition into which their marital relations drifted.

It would serve no useful purpose to go over in detail the whole of the evidence. Suffice it to say that it amply supports the Chancellor's finding. . . .

Plaintiff has established such a case of harsh treatment, threats, and intimidation, producing all the effects described by the Chancellor, as to bring it well within the definition of cruelty occasioning injury to health, and there being danger of the same line of conduct continuing, the case is one for the intervention of the Court for plaintiff's protection.

Emphasis has been laid on the Chancellor's well-intentioned attempt to bring about a reconciliation, and plaintiff's refusal to accept his recommendation. But the very fact that plaintiff, after hearing his strong appeal and after a night's reflection, was unable to nerve herself to undergo the risk of resuming life with defendant, feeling and knowing that she was unable to place any reliance on the sincerity of his promises, must have strongly impressed the Chancellor, as it cannot fail to impress every one, with the reality of her experiences and the strength of her apprehensions.

Appeal dismissed with costs.

OSLER and GARROW, JJ.A., each gave reasons in writing for the same conclusion.

MACLAREN, J.A., also concurred.

MEREDITH, J.A., dissented, for reasons given in writing.

NOVEMBER 3RD, 1906.

C.A.

McAULIFFE v. COUNTY OF WELLAND.

Negligence—Navigable River—Erection of Bridge—County Corporation—Leaving Sunken Piles in River—Injury to Ship—Contributory Negligence—Conflicting Evidence—Findings of Trial Judge.

Appeal by defendants from judgment of CLUTE, J., 6 O. W. R. 819, in favour of plaintiff in an action for dam-

ages for injuries received by their tug "Michael Davitt" whilst navigating the Welland river at or near a place known as Montrose Bridge.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

H. S. Osler, K.C., and L. C. Raymond, for defendants.

W. M. German, K.C., for plaintiff.

MOSS, C.J.O.:— . . . The main ground of objection to the judgment was . . . that the acts of defendants did not amount to negligence or misfeasance, but at most they amounted merely to nonfeasance, for which defendants would not be liable. But this argument appears to be based upon a fallacy. It assumes that defendants did nothing actively to obstruct or interfere with the navigation of the stream or to make it dangerous for vessels to use the waters of the river at the point where plaintiff's vessel was injured. The evidence, however, shews that the piles which were cut off below the surface of the water were originally placed in the water by or under the authority of defendants in constructing a former bridge, and that in removing that bridge in order to construct the present swing-bridge, these piles were exposed and separated from the north pier forming the rest for the end of the swing-bridge on that side of the river. In this position they were an obstruction to the stream, but would probably not have been so dangerous to navigation if they had not been further dealt with. But, again, the evidence shews that by defendants' direction and under their authority the tops of the piles were cut off some 5 or 6 feet below the surface of the water. By this act their presence in the stream was concealed from persons navigating or using the stream on that side of the river, and they thus became dangerous to vessels of greater draft than their tops were below the surface.

It was argued that this work was done by the contractor for the construction of the new bridge, contrary to the terms and specifications of the contract, which provided that the contractor was to remove any old piles or timber projecting beyond the bottom of the river in the vicinity of the bridge, leaving the entire channel of the river free from

obstructions, and that the change from or neglect to perform the terms of the contract and specifications were not known to or acquiesced in by defendants. It is plain from the terms of the specifications that defendants considered that piles in the position of those in question would be an obstruction, and that it was proper to remove them in such way as to leave the entire channel free from such obstruction. Probably defendants could not, by intrusting the removal of the obstructions to a contractor, thus relieve themselves of responsibility, but the evidence shews that . . . the cutting below the surface, instead of removal, was agreed upon with the knowledge, sanction, and approval of defendants' engineer and inspector in charge of the work to be done by the contractor under the contract. there was in effect a direction to cut them down instead of removing them, and the cutting down created the dangerous situation.

It was also argued that the cutting below the surface was done under the authority and by the direction of the government of the Dominion, who have a certain control over the Welland river as forming part of the Welland canal system between Port Robinson and Chippewa. But the evidence shews that the government of the Dominion took no part in the construction of the bridge and gave no orders or instructions with regard to it, or any work in connection with it. The bridge was entirely a municipal work done and paid for by defendants. The utmost that can be said to have taken place was the expression of an opinion by the superintending engineer of the Welland canal, when the question whether the piles were to be removed or cut down by the contractor was being discussed between the latter and defendants. It would rather seem that this took place after the piles had been cut down, and the witness was asked by the contractor whether they were a menace to navigation, and he said no. It does not appear that he had any authority from the government to make any order or direction or to express an opinion on its behalf upon the question.

The further point was the conduct of the captain in charge of the tug in using the channel to the north instead of the south of the centre pier of the bridge. The evidence fully supports the view of the trial Judge that he was justi-

fied in assuming from what he saw that the north channel was an open channel for use by vessels navigating the stream, and that he adopted the course ordinarily taken by captains in going to the right or north of the centre pier, in the absence of any plain and unmistakable notice or indication that that was not a navigable channel.

Appeal dismissed with costs.

OSLER, GARROW, and MACLAREN, JJ.A., concurred.

MEREDITH, J.A., concurred in the result, for reasons stated in writing.

NOVEMBER 3RD, 1906.

C.A.

WILSON v. HAMILTON STEEL AND IRON CO.

*Negligence — Contributory Negligence—Findings of Jury—
Disagreement — Nonsuit — Master and Servant—Injury
to Servant.*

Appeal by defendants from order of a Divisional Court dismissing an appeal from the judgment of MABEE, J., at the trial, refusing to nonsuit plaintiffs or to enter judgment for defendants upon the findings of the jury. The action was brought by John Wilson, an infant of 19, and by his father, William Wilson, to recover damages for injuries sustained by the infant plaintiff while in the employment of defendants as a craneman, owing to the alleged negligence of defendants. The infant plaintiff fell from a height of 30 feet, and alleged that the fall was caused by the defective condition of a pulley. Questions were put to the jury, and they answered that there was a defect in the condition of defendants' works, viz., broken flange and pulley; that plaintiff was guilty of negligence which caused or contributed to the accident, his negligence consisting in not moving the crane closer to the platform. The jury disagreed as to and did not answer the 7th question, which was, whether there was any defect in the planking in question that caused or contributed to the acci-

dent, and they did not assess the damages. The Court below regarded this as a disagreement, and held that there was evidence which could not have been withdrawn from the jury.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJA.

E. E. A. Du Vernet and W. B. Raymond, for defendants, contended that the 7th question was immaterial in view of the other findings; and that the action should be dismissed.

M. J. O'Reilly, Hamilton, for plaintiffs.

OSLER, J.A.:—The answers of the jury to the 4th and 5th questions clearly disposed of the case. It is found that plaintiff was guilty of negligence which caused or contributed to the accident, and that this negligence consisted in not moving the crane closer to the platform. Both answers are supported by the evidence. It may be assumed that the 7th question, which the jury could not agree in answering, was answered in favour of plaintiff, viz., that there was some defect in the planking of the platform which caused or contributed to the accident, but this would not better plaintiff's case. The accident would then appear to have been caused by the joint negligence of both parties, and this also would shew that the action was not maintainable. I do not see that the case admits of anything more being said except that the appeal must be allowed and the action dismissed with costs, if defendants ask for costs.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., agreed in the result.

MEREDITH, J.A., also agreed in the result, for reasons stated in writing.

NOVEMBER 3RD, 1906.

C.A.

GIBSON v. GARDNER.

Account — Reference — Executor — Trustee — Stated Account—Audit by Surrogate Judge—Consent Judgment—Effect of—Re-opening Account.

Appeal by plaintiff from order of BOYD, C., 7 O. W. R. 474, dismissing appeal by plaintiff from the ruling of the

Master in Ordinary in the course of a reference under a consent judgment to take the accounts of defendant Gardner as executor and trustee. The Master certified that he had adopted the result of an accounting before a Surrogate Court Judge up to the time of such accounting. The Chancellor held that the audit of the accounts before the Judge was equivalent to a settled account, and that by the practice of the Court the Master was to have regard to settled accounts.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

F. Arnoldi, K.C., for plaintiff.

A. H. Marsh, K.C., for defendant Gardner.

OSLER, J.A.:—The language of the consent judgment of 22nd November, 1905, directing accounts between the parties, must be interpreted in the same way as similar language used in a judgment in invitum would be. The parties consent that certain accounts shall be taken, adopting the language of the common form of a judgment for that purpose. Are not the usual rules of law and procedure, statutory and otherwise, to be applied in taking such accounts? I have no doubt that they are, and that if the parties meant anything else, they should have said so. If this be so, the whole argument against the judgment of the Master in Ordinary, and of the Chancellor affirming it, fall to the ground.

The defendant Gardner is the executor of Mahala Gibson, deceased, and as such is also executor of S. B. Burdett, deceased. He filed accounts of his dealings with both estates in the office of the proper Surrogate Court, where, after a contested examination before the Judge, extending, as it would seem, over 9 months, and at a cost of some \$1,700, they were approved. All parties except the infant defendant were represented by counsel.

Section 72 of the Surrogate Courts Act, R. S. O. 1897 ch. 59, enacts that where an executor has filed in the proper Surrogate Court an account of his dealings with the estate of which he is executor, and the Judge has approved thereof in whole or in part, if the executor is subsequently required to pass his accounts in the High Court, such approval, except so far as mistake or fraud is shewn, shall be binding upon

any person who was notified of the proceedings taken before the Surrogate Judge, or who was present and represented thereat, and upon any one claiming under such person. A similar provision now exists in the case of trustees under a will: (1900) 63 Vict. ch. 17, sec. 18, which was in force when the proceeding now relied upon was taken.

Nothing in the judgment suggests that in taking the accounts thereby directed, the right of defendant Gardner, whether as trustee or executor, to avail himself of these provisions as against plaintiff was intended to be excluded, and so long as the order of the Surrogate Court stands unimpeached the accounts filed by defendant and approved by the Judge are binding upon plaintiff, except in so far as she may be able to shew mistake or fraud therein.

It was urged that this defence was one of estoppel or res judicata, and that defendant could not avail himself of it, as he had not pleaded it. It is enough to say that, even were this the real nature of the defence, the action was conducted without pleadings, and that the defence arises for the first time on the evidence when the accounts are investigated in the Master's office. The effect is then that which is given to it by statute or the general rules of law relating to settled accounts. It is unnecessary to refer to any other authorities than those cited in the judgments below.

Appeal dismissed with costs.

MOSS, C.J.O., GARROW and MACLAREN, J.J.A., concurred.

MEREDITH, J.A., concurred in the result for reasons stated in writing.

NOVEMBER 3RD, 1906.

C.A.

HAVERSTICK v. EMORY.

Negligence—Injury to Bicyclist by Motor-car—Evidence for Jury—Setting aside Nonsuit—New Trial.

Appeal by defendant from order of a Divisional Court, 7 O. W. R. 799, setting aside a nonsuit entered by ANGLIN, J., and directing a new trial of an action for damages for injuries sustained by plaintiff, when riding a bicycle on a public highway, by being run into by defendant's motor-car.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

H. E. Rose and J. E. Cook, for defendant.

J. M. Godfrey, for plaintiff.

MEREDITH, J.A.:—Nothing turns upon the character of the vehicle which defendant was driving; if it had been a donkey cart or a bicycle or any other of the more common means of conveyance, a like accident might just as well have happened; the injury might have been less, but it is possible that it would have been greater; and it is safer, whether with Judge or jury, to consider the case without arousing the natural antipathy of pedestrians and horsemen against the modern horseless carriage. Defendant was quite as much within his rights in driving such a carriage as plaintiff was in riding her bicycle. Each was bound to take reasonable care to avoid injury, and even unnecessary inconvenience to each other and to all others exercising their rights upon the highway; and in her own interests, as well as having regard to the rights of others, the fact that she was carrying a parcel in one hand, and could use the other only in controlling her bicycle, called for greater caution on her part than if she had not been so incumbered.

Plaintiff's case at the trial was put upon two grounds: (1) that defendant should not have turned at the place where he did; and (2) that he should have sounded his horn. If these were the only grounds upon which plaintiff can base a claim, I am by no means sure that the nonsuit was wrong. There is no rule or regulation requiring vehicles to turn only at certain places. Defendant was quite within his right in turning where he did, but was bound to take that care which was reasonable, in all the circumstances, including the place of turning, to avoid injury to others or other unnecessary interference with their rights. It is difficult to perceive what would have been gained by sounding the horn. Plaintiff had seen defendant's car, and knew, as well as any sound could inform her, that it was there. A sound from the horn would have indicated, doubtless, that it was, or was about to be put in motion. But what gain would that knowledge bring? It would probably have rather misled plaintiff to think that it was going, or about to go, ahead, and so away from her. And if it had kept on sounding, what could she

have done to have prevented being run down? She was proceeding on her way, hampered by her bundle; it might only have confused her and made the accident more likely.

But upon other grounds a *prima facie* case seems to me to have been made out, however the subject of sounding the alarm is to be dealt with. Defendant was doing that which must always be done with care, that which, upon such a highway as that in question, is pretty sure always to interfere more or less with the traffic; the time of the day made greater caution necessary; it was in the uncertain and deceptive middle light betwixt day and night, and no warning was given, if any could have been given, to indicate that the car was being turned around. It was plainly defendant's duty, upon turning, to see, as well as he could, whether he could then turn with safety to others as well as himself, and if he could not plainly see, to be the better on the look-out, and the more cautious in turning. All the circumstances of the case seem to me to entitle plaintiff to an answer from defendant, and, upon the evidence as it now stands, to go to the jury, contending that if defendant did not see plaintiff and avoid injuring her, he ought to have done so, and so was guilty of negligence; or else that he did see her and did not so act, as he might, that no injury would have been inflicted, whatever the jury might think and find upon such contentions—quite apart from any right to go to the jury on the question of sounding a warning or alarm. If the jury should find that the proximate cause of plaintiff's injury was neglect to sound the horn, it will be time enough to consider whether there was any reasonable evidence to go to the jury on that question, which may, of course, if plaintiff relies upon it, be supported by further and better evidence at the next trial.

The statute 3 Edw. VII. ch. 27, sec. 5, provides only that the alarm shall be sounded whenever it shall be reasonably necessary to be sounded for the purpose of notifying pedestrians or others of the approach of a motor vehicle.

OSLER, J.A.:—I agree with the judgment of the Divisional Court, for the reasons given by them, that the case should not have been withdrawn from the jury, and that there must be a new trial.

MOSS, C.J.O., GARROW and MACLAREN, J.J.A., concurred.

Appeal dismissed with costs.

NOVEMBER 3RD, 1906.

C.A.

RE CANADIAN TIN PLATE DECORATING CO.

MORTONS' CASE.

*Company — Winding-up — Contributory — Application for
Stock—Withdrawal—Absence of Allotment and Notice—
Notice of Call.*

Appeal by the liquidator of the company in a winding-up proceeding from order of FALCONBRIDGE, C.J., affirming the order of the local Master at Hamilton removing the names of the respondents from the list of contributories.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

J. M. McEvoy, London, for the appellant.

W. E. Middleton, for the respondents.

OSLER, J.A.:—The grounds upon which the Courts below proceeded in holding that the respondents were not liable are not before us; but of the numerous objections which were taken in their behalf to the liquidator's proceedings against them, I find it necessary to notice but one, viz., that stock in the company had never been allotted to them, so that they never in point of fact became shareholders. The liquidator contented himself with proving that on 19th August, 1904, the respondents had signed an application not under seal—I will assume that it is a joint application, though in the view I take of the case this is not material—by which they subscribed for 25 shares of the common stock of the company at the par value of \$100 per share, for which they agreed to pay "dollars par upon the delivery of the regular stock certificate." The stock ledger of the company was produced, in which, under the names of the respondents and the heading "common stock," under date 19th August, is the entry, "Allotted Bought Dr. 25 shares, amount \$2,500, balance 25 shares, Dr. \$2,500."

The application was canvassed for by one Hesson, an agent of the company, who, in order to induce the respondents to subscribe, made certain statements of fact as to other named persons having already subscribed for stock in the company—statements which were shewn to have been absolutely false to his knowledge. He took the respondents down to the company's factory, and there introduced them to one Thompson, the manager. They were shewn through the factory by both of them and pressed to subscribe. They were disposed to take 5 or 6 shares, but Hesson, in Thompson's presence, said that they could not take less than \$1,000 worth. The respondents told them they had no money on hand, and if they took anything they would have to raise money by parting with some stock Mrs. Morton held in another company, called the Carter-Crume Company, and if that was sold as high as Hesson assured them it could be sold, they would take 25 shares. Both parties understood that the shares would be paid for by their means, and the respondents signed the application, and handed it to Thompson. Thompson and Hesson then demanded a payment on account, and they were told that if they would come to the respondents' house they would be given a cheque for \$100. Hesson hastened there at once, and on the arrival of the respondents they handed him the cheque. In the afternoon of the same day the respondents began to suspect from what they heard from other persons that they had been defrauded, and went back to the factory and saw Thompson, who endeavoured to reassure them, but on the following morning they determined to withdraw from their application, and went to the office of the company on which their cheque was drawn and stopped payment of it. It had in fact been already presented and payment refused for want of funds. Later on the same morning Hesson called at the respondents' house to get Mrs. Morton to sign a power of attorney to sell the Carter-Crume shares, which she refused to do, and told him emphatically that they would have nothing more to do with the stock they had applied for; in short, as plainly as possible that they repudiated the application.

Neither Thompson nor Hesson was called as a witness before the local Master on the motion to settle the list of contributories, and the minute book contains no note or entry of any resolution of the directors allotting stock to the respondents or directing notice of allotment to be sent to them,

nor was a formal notice of allotment ever sent to either of them. No attempt was made to enforce payment of their cheque, and they received no further communication on the subject of the shares now said to have been allotted to them until the middle of the following November, when Thompson, the company's manager, sent them notice of a call and demanded payment.

It may plausibly be contended as being the fair result of the evidence that the respondents, as they had a right to do, withdrew their application for the shares, and that this came to the notice of the company on the day after the application was signed. This would be an answer to the liquidator's demand: *Truman's Case*, [1894] 3 Ch. 472. But I think a plainer ground is that the company never allotted the stock subscribed for or gave notice of its allotment to the subscribers: *Homer v. District Consolidated Union*, 39 Ch. D. 546 . . . *Robinson's Case*, L. R. 4 Ch. at p. 322.

The entry of the respondents' names in the stock ledger is not conclusive: *Gunn's Case*, L. R. 3 Ch. 40; and the absence of any record in the minute book of any resolution of the directors dealing with the respondents' application, and the silence of the persons who ought to know whether it was ever brought before or passed upon by the board, strongly supports the inference that the stock never was allotted, and that the entry of 19th August was merely the unauthorized act of Thompson or of some clerk acting under his instructions.

It was pressed on us by Mr. McEvoy that on 1st November and again on 15th December, 1904, the directors passed resolutions declaring a call of 10 per cent. on "the unpaid capital stock," and on 23rd January, 1905, passed another resolution calling up "the balance of the unpaid capital stock of the company," and that notices of these calls had been sent to and probably received by the respondents.

I do not think that this assists the appellant. Whether the mere notice of a call can be regarded as equivalent to notice of allotment is perhaps questionable: *Nasmith v. Manning*, 5 A. R. 126, 5 S. C. R. 417. It may perhaps be so framed as to be sufficient for that purpose, but I do not decide it. The appellant's difficulty arises at the earlier stage. There never was, as I hold, any appropriation of specific

shares to the respondents. The resolutions making the calls certainly cannot be regarded as such. These deal with stock which has been already allotted, and with nothing else, and the fact that Thompson sent notices of such calls to the respondents amounts to nothing if the stock had not been already allotted to them by the directors. There having therefore been no response by the company to the respondents' application, they never became shareholders, and have been properly struck off the list of contributories.

Appeal dismissed with costs.

MOSS, C.J.O., GARROW and MACLAREN, J.J.A., concurred.

MEREDITH, J.A., agreed in the result, for reasons stated in writing.

NOVEMBER 3RD, 1906.

C.A.

REX v. SAUNDERS.

Criminal Law—Keeping Common Betting House—Book-makers in Charge of Betting Booth on Race-course of Incorporated Association—"House, Office, Room, or Other Place"—Movable Structure—Criminal Code, secs. 197, 198, 204.

The defendants were brought before one of the police magistrates for the city of Toronto upon an information charging them with keeping a disorderly house, to wit, a common betting house. They elected to be tried summarily, and pleaded not guilty. Evidence was adduced, and they were found guilty and fined.

It appeared that during the month of May, 1906, the Ontario Jockey Club, an incorporated association, held their annual spring race meeting at their race-course and grounds known as "The Woodbine." On part of the grounds was situate a stand with lawn in front known as the members'

stand and lawn. On another part of the grounds, to the east of the members' stand and lawn, was erected a stand known as the public stand, with a lawn in front forming a large space separated by a fence from the members' lawn. East of and adjoining the public stand was a building or structure of wood wholly walled in on the north side, partly walled in on the east and west sides, but open on the south, and covered with a projecting shingled roof. Under the roof of this building were a number of what the witnesses called betting boxes or booths. They were not stationary, but stood on castors, by means of which they could be moved from one part of the building to another. In rainy weather they were left under the roof. In fine weather they might be, and usually some of them were, moved out on the lawn in front of the building. These were rented by book-makers, the rent payable for each one during the race meeting in question being \$100 a day. During a portion of the time while the race meeting was in actual progress, that is to say, between 19th and 28th May, 1906, defendants were in possession of one of the booths, and were engaged in making bets with other persons attending the races. They exhibited on a board the names of the horses named to start in a race, and betted with persons desirous of backing any one of them for first or second place. The backer paid his stake to one of the defendants, and received a ticket shewing the terms of the bet. If he won, he was paid by one of the defendants on presentation of the ticket. In this way defendants made bets with large numbers of the public during each of the above specified days of the meeting.

Upon the trial defendants' counsel objected that defendants could not be convicted under sec. 198 of the Criminal Code, because a booth such as was used was not a house, office, room, or other place within the meaning of sec. 197 of the Code, and further because the offence, if any, was against the provisions of sec. 204 of the Code, and defendants were entitled to the benefit of the saving clause or proviso contained in sub-sec. 2 of that section.

At defendants' request the magistrate stated a case for the opinion of the Court of Appeal.

The facts as found by him on the evidence, which was made part of the case, were set forth as follows:

1. That the Ontario Jockey Club is a duly incorporated race association.

2. That the common betting house herein referred to was opened, kept, and used by defendants during the actual progress of a race meeting.

3. That defendants kept a betting booth placed in that part of the grounds of the Ontario Jockey Club specially set apart for betting purposes.

4. That such betting booth was opened, kept, and used by defendants for the purpose of betting with persons resorting thereto.

5. That all the defendants were engaged in conducting the business of the said betting booth, which was leased by defendant Saunders and under his immediate superintendence.

6. That a very large number of bets were made by defendants against certain horses winning the different races, with persons resorting to said booth.

7. That in the enclosure specially set apart by the Ontario Jockey Club for betting purposes as aforesaid there are 36 betting booths, including the one above mentioned, known as "two dollar books," which were leased to persons called "book-makers" for the purpose of betting as aforesaid.

8. That defendants conducted and managed a betting booth as aforesaid during the whole of the race meeting, and defendant Saunders paid therefor and for the betting privilege \$100 for each day.

9. That the betting booths in question are of the following dimensions: 6 feet 2 inches in length; 5 feet 2 inches in width; and 4 feet 7½ inches high; and are equipped for the purpose of carrying on betting therein, and are supplied with castors, so that in fine weather they may be moved from under the covered part of the betting section of the grounds to a distance of a few feet from the roof.

10. Defendants' position was changed daily from booth to booth, there being a daily drawing for position among the book-makers, but during each day these defendants occupied the same booth, where they made bets with persons resorting thereto.

The questions submitted by the magistrate were:—

(a) Am I right in holding that a betting booth as aforesaid falls within the terms of sec. 197 of the Criminal Code as a house, office, or other place?

(b) Am I right in holding that the provisions of subsec. 2 of sec. 204 of the Criminal Code do not apply to the offence of which the defendants are found guilty?

The case was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, J.J.A.

J. M. Godfrey, for defendants.

J. R. Cartwright, K.C., for the Crown.

MOSS, C.J.O.:—There is once more raised the question so much debated in *Rex v. Hanrahan*, 3 O. L. R. 659, 1 O. W. R. 346, and *Rex v. Hendrie*, 11 O. L. R. 202, 6 O. W. R. 1015, as to the extent and meaning of secs. 197, 198, and 204 of the Criminal Code, and the relation of the latter to the two former.

It will, however, be more convenient to deal seriatim with the questions as submitted. In view of the findings and evidence, the first question presents no serious difficulty. Much light is afforded by the cases decided in England under the Imperial Act 16 & 17 Vict. ch. 119, as well as by our own decisions.

Whether the booth in question here was a house, office, or other place, within the meaning of sec. 197, is largely, if not entirely, a question of fact. The point to be determined is whether the nature of the structure, its position on the race grounds, the manner of its occupation by defendants, and the uses to which it was being put, justify the conclusion that it was a house, office, or other place, opened, kept, or used for any of the purposes specified in the section.

The English cases develop two lines of decisions depending upon the facts in each case. They turn chiefly on the point whether there was or was not such a fixity or localization by the persons charged of structure or ground as to constitute a "place" within the 16 & 17 Vict. ch. 119.

The Courts have declined to define a "place" in general terms, but they recognize the principle that a "place" must

be in some sense fixed and ascertained, and the inquiry is whether the facts of the particular case shew that the person charged was making such use of a house, office, room, or other place, in which he was operating, as to bring him within the Act. . . .

[Reference to *Shaw v. Morley*, L. R. 3 Ex. 137; *Bows v. Fenwick*, L. R. 9 C. P. 339; *Liddell v. Lofthouse*, [1896] 1 Q. B. 295; *Brown v. Patch*, [1899] 1 Q. B. 892, 19 Cox C. C. 330; *Powell v. Kempton Park Racecourse Co.*, [1897] 2 Q. B. 242, [1899] A. C. 143.]

Are the facts of the present case sufficient to justify an inference similar to that drawn in *Brown v. Patch*? The defendants were in charge of a definite localized place, and occupying and using the structure for the purpose of carrying on the business of betting with all persons who might resort thereto for the purpose of betting with them. It was so situated and marked out that any one wishing to bet could readily find defendants there. The booth, though open to the air, had some of the characteristics of a room and many of those of an office. It was enclosed by walls of a considerable height, and it contained the usual fittings or accessories of an office, such as desks, tables, and chairs. Business was transacted there in connection with bets made and the money received and paid in respect of such bets. It was as much an "office" and a "place" as the structure described in *Shaw v. Morley*, *supra*. The magistrate was, therefore, right in holding that the betting booth so used by defendants fell within the terms of sec. 197 of the Code. If it was not an "office," it was certainly a "place," but it was probably both.

The first question should, therefore, be answered in the affirmative.

The answer to the second question depends . . . upon a consideration of the relation, if any, of sec. 204 to secs. 197 and 198.

Reading the former, it is not easy to see what it has in common with the other two, except in respect of the general ground that each is directed to the suppression of methods adopted for enabling persons to indulge in the practice of betting. Each seeks to prevent or end means adopted for giving persons who are minded to bet an easy opportunity

of doing so. But they do not deal with the same cases or class of cases. Without going the length of saying that proof of the commission of some of the acts prescribed by sec. 204 would not be any evidence to support a charge of keeping a common betting house under secs. 197 and 198, it may safely be said that it is not easy to conceive a case in which a person charged under sec. 204 could be convicted on proof merely of the facts necessary to support a charge under secs. 197 and 198.

In the present case there is nothing in the findings of the stated case or the evidence to bring defendants within the scope of sec. 204. The most plausible argument used in favour of the view that this was a case falling within sec. 204 was that defendants were keeping, exhibiting, or employing a device or apparatus for the purpose of recording bets or wagers. But it seems plain that the device or apparatus referred to in sec. 204 (b) is something entirely different from a betting booth to which the public resort for the purpose of betting with a person who appears to be the owner, occupier, keeper, or manager thereof, or the ordinary equipment of such a booth. . . .

[Reference to *People v. Weithoff*, 93 Mich. 631; *State v. Shaw*, 39 Minn. 153.]

The provisions of sec. 204, except the words "or made on the race-course of an incorporated association during the actual progress of a race meeting" at the end of sub-sec. (2), were first enacted by Parliament in 1877 by 40 Vict. ch. 31. In 1892, when the Criminal Code was first enacted, the latter words were added to sub-sec. (2). At the same time secs. 197 and 198 were for the first time introduced into our law, being taken from the Imperial Act 16 & 17 Vict. ch. 119. There was then no more doubt than there is to-day that these provisions prohibited the keeping of a common betting house on a race-course, even though the betting carried on was during the actual progress of the races. If it was the intention of Parliament to sanction the existence of betting houses at race-courses at such times and in such circumstances, one would have expected that when it enacted these sections it would have introduced into them a clause similar in import to the words added to sec. 204. Instead of so doing, it expressly confined the operation of these words to the provi-

sions of the latter section. In face of the clear language of sub-sec. 2 of that section, it does not seem possible to extend the saving clause to any other sections, or to say that their provisions are inapplicable to every form of betting carried on upon a race-course during the actual progress of a race meeting. And in *Regina v. Giles*, 26 O. R. 586, a Divisional Court, the then ultimate court of appeal in criminal cases, seems to have been of the opinion that secs. 197 and 198 and sec. 204 (1) did not relate to the same matters: see *Boyd, C.*, p. 592, and *Meredith, J.*, p. 594.

For the above reasons the answer to the second question should be in the affirmative. Indeed it might have sufficed to refer to the reasons given in *Rex v. Hanrahan*, *supra*. But the earnestness with which it was argued that this case was not governed by the decision in that case may afford some reason for again traversing the same ground.

The questions should be answered in the affirmative, and the conviction affirmed.

OSLER, J.A., gave reasons in writing for the same conclusion.

MACLAREN, J. A., also concurred.

GARROW, J.A., dissented, for reasons stated in writing. Briefly his opinion was that secs. 197 and 198 have no application to the case of betting carried on upon the race-course of an incorporated association during the actual progress of a race meeting, whether or not such betting takes place within or without doors, or in any particular "house, office, room, or other place," so long as it is within the boundaries of the race-course, and so long also as the betting is confined to the races then in progress upon that race-course.

MEREDITH, J.A., also dissented, being of the like opinion.

NOVEMBER 3RD, 1906.

C. A.

GOODWIN v. CITY OF OTTAWA.

Appeal to Court of Appeal—Leave to Appeal from Order of Divisional Court — Special Grounds — Assessment and Taxes.

Motion by plaintiff for leave to appeal from order of a Divisional Court, ante 77, affirming judgment of TEETZEL, J., 7 O. W. R. 204, after trial without a jury at Ottawa, dismissing the action.

H. S. Osler, K.C., for plaintiff.

W. E. Middleton, for defendants.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, J.J.A.), was delivered by

MOSS, C.J.O.:—The action is, in form, one to restrain defendants from collecting or enforcing payment of taxes upon an assessment for income in respect of dividends from shares held by plaintiff in the Ottawa Electric Railway Company.

The question, so far as monetary value is concerned, is whether plaintiff is liable to pay a sum of about \$25 a year for the next 17 years at the furthest, or about \$425 in all. It is said that there is a special feature, in that there are other shareholders of the railway company resident in Ottawa who are in the same plight.

But there are other shareholders resident in other parts of Ontario who, when assessed in the several municipalities in which they reside, could not avail themselves of the agreement sought to be set up against defendants. Plaintiff himself could not do so if he went to reside in another municipality.

It cannot be said that the litigation is one affecting the rights of the whole body of shareholders. In point of fact, all the shareholders, including plaintiff, are obtaining an incidental advantage from the exemption given the company,

inasmuch as the saving of outlay thus effected presumably enhances the amount of the dividends on the shares. Neither on this branch of the case, i.e., the effect of the agreement set up in the pleadings, nor on that touching the claim to exemption under sub-sec. 7 of sec. 10 of the Assessment Act—the provisions of which as affecting the shares and dividends in question must be read in connection with sub-clause (i) of sub-sec. 1 of the same section—does the case seem to be of such importance or to present such special reasons for treating it as exceptional as to justify the allowance of a further appeal.

Motion refused with costs.

ERRATUM.

In *Munro v. Smith*, ante at p. 456, 9th line from the top and following lines, strike out all the words from “but it is very obvious” to the end of the paragraph. These words were inserted owing to a misapprehension.

applicants. The \$1,184.09 in Court must also be paid out to the applicants.

Counsel for Hood and Snow, Lewis & Co., and the Staeble estate, said they were agreed upon the division of the moneys between their clients, so the formal order may be settled by consent or spoken to again.

The case involves much hardship upon the liquidator, and I make no order as to the costs of this application.

MABEE, J. NOVEMBER 7TH, 1906.

CHAMBERS.

ANDERSON v. NOBELS EXPLOSIVE CO.

Writ of Summons — Service out of Jurisdiction — Cause of Action—Rule 162 (e)—Tort Committed in Ontario—Injury to Plaintiff by Defective Fuse Supplied to his Employers by Defendants in Foreign Country.

Appeal by plaintiff from order of Master in Chambers, ante 439, setting aside order obtained by plaintiff allowing service upon defendants in Glasgow, Scotland, of the writ of summons and statement of claim, and dismissing the action with costs. Action to recover damages for injuries sustained by plaintiff in Ontario, owing, as alleged, to the premature explosion of a defective fuse supplied by defendants, in Scotland, to plaintiff's employers, in Ontario.

T. N. Phelan, for plaintiff.

W. H. Blake, K.C., for defendants.

MABEE, J.: . . . Rule 162 (e) provides in effect that service out of Ontario may be allowed in an action founded upon a tort committed in Ontario, and the question is whether the statement of claim discloses such a cause of action. If the contention of plaintiff prevails, the scope of the Rule will be greatly widened. No case is reported where the Rule has been applied to an action like the present, and doubtless foreign manufacturers will be greatly startled if the practice of our Courts permits what plaintiff is contending for. A similar action could not be brought in England or Scotland against a Canadian manufacturer upon a

Counsel for the liquidator contended that his costs and compensation should form a first charge upon the estate in his hands, while counsel for Hood and Snow, Lewis & Co., and the Staebler estate, contended that the funds should go first in payment of the costs of Lewis & Co., and that the balance of the fund should be divided pro rata between Hood and Snow and the Staebler estate. If this latter contention prevails, the liquidator is left without funds to pay his own costs of the liquidation proceedings, and loses his compensation.

The affidavit of the liquidator shews that the \$600 in his hands was recovered by him in consequence of certain litigation with other alleged contributors of the company, and in respect to which he incurred costs that have not been paid, and that he gave personal attention to settlements made connected with the recovery of this \$600.

The cases seem to shew that upon the facts stated here Hood and Snow, Lewis & Co., and the Staebler estate, are entitled to be paid in priority to the liquidator, and that the reasonableness of the proceedings of the liquidator forms no element in the matter; this is settled by *In re Home Investment Society*, 14 Ch. D. 167, and *In re Dominion of Canada Plumbago Co.*, 27 Ch. D. 33.

This principle, however, should not extend to that part of the fund that was realized by litigation undertaken by the liquidator and the costs of which have not been paid: In *re Staffordshire Gas and Coke Co.*, [1893] 3 Ch. 523. . . . I think, in addition to the realization costs connected with the \$600, the liquidator should have priority for a reasonable sum as his compensation for the care taken and time spent upon that branch of the liquidation.

The matter is still before the local Judge, and he may fix a proper sum for the liquidator's costs, connected with realizing the \$600, including therein a sum that will fairly compensate the liquidator for his services connected with that matter alone. These proceedings were all taken before the local Judge, and he is in a favourable position to know what would be proper to allow for costs and compensation.

The sum so allowed may be retained by the liquidator out of the \$600, and the balance must be paid over to the

was made striking their names off the list of contributors. See Hood v. Baden, 36 S. C. R. 476. The formal order of the Supreme Court made the following disposition of the costs: "And this Court did further order and adjudge that the said respondent (the liquidator) should and do pay to the said appellants (Hood and Snow), out of the assets of the said the Baden Machinery Company, the costs incurred by the said appellants as well in the Court of Appeal of Ontario, and in the High Court of Justice, as in this Court." The costs of the appellants were taxed in the Supreme Court at \$852.69, and in the Court of Appeal and High Court at \$868.37, making a total of \$1,721.06, which the liquidator has been ordered to pay "out of the assets" of the Baden Machinery Company. The affidavit of the liquidator shews that the assets of the company consist of \$1,184.09 in Court and \$600 to his credit in the bank, and "that the costs of the winding-up proceedings and of the litigation incident thereto, including the fees payable to the local judge to whom the matter was referred, and before whom the proceedings have been carried on, are still unpaid: . . . that I have not as yet received any remuneration for my services as liquidator." The affidavit further sets forth the steps taken to ascertain the facts connected with the supposed liability of Hood and Snow to the company, and the care taken by the liquidator.

This feature of the case, I think, must be resolved in favour of the liquidator, and it would appear that he was entirely justified in the attempt made; he had the judgment of the local judge, in turn affirmed by Mr. Justice Ferguson, and by the Court of Appeal, as well as the views of two judges in the Supreme Court in his favour. Out of 11 judges before whom the matter came, 8 were of opinion that the contention of the liquidator was right, and that Hood and Snow were liable as contributors. The liquidator was well advised in the course he took; indeed, had he omitted to present to the Court the evidence in his hands looking to the liability of Hood and Snow, he would have scarcely been doing his duty.

The costs of Lewis & Co., the creditors who obtained the winding-up order, have not been paid, and the representatives of Mr. J. M. Staebler have an order against the liquidator for the payment of certain costs.

missing motion by appellants to compel plaintiff to elect whether he proceed against the appellants or against defendant Eckardt.

F. R. MacKelcan, for appellants.

W. H. Blake, K.C., for defendant Eckardt.

F. Arnoldi, K.C., for plaintiff.

FALCONBRIDGE, C.J., dismissed the appeal with costs against the appellants in any event.

MAREE, J. NOVEMBER 6TH, 1906.

CHAMBERS.

RE BADEN MACHINERY CO.

Costs—Winding-up of Company—Costs of Alleged Creditors—Costs Ordered to be Paid out of Assets—Deficiency of Assets—Costs of Petitioning Creditor and Others—Abatement.

Application by Hood and Snow for an order that the liquidator of the Baden Machinery Company pay out of the assets of the company certain costs which the applicants had been adjudged by the Supreme Court of Canada to be entitled to.

W. E. Middleton, for Hood and Snow.

J. E. Jones, for Lewis & Co. and the Stæbler estate.

J. C. Haight, for the liquidator.

MAREE, J.:—The winding-up order was made upon the application of Messrs. Lewis & Co., creditors of the company, J. R. Eden being appointed liquidator, and upon his application Hood and Snow were placed upon the list of contributors; they appealed, and Ferguson, J., sustained the order of the local Judge, and he in turn, upon a further appeal, was upheld by the Court of Appeal. The matter was then carried to the Supreme Court of Canada, where Hood and Snow were successful in their contention, and an order

I am, therefore, of opinion that the motion fails if made on the ground of irregularity.

No doubt, even if the irregularity is waived, that will not prevent a similar motion under 529 (d) within the proper time. But is it not as yet too soon to invoke clause (d)? So far from the cause being at issue, the statement of defence of the street railway company has not yet been delivered. It was stated on the argument, and seems probable, that the action will be disposed of on admissions of fact, and it was argued that *Powell v. Cobb*, 29 Ch. D. 488, shows that such a motion cannot be made until the issues are defined, and it is made plain whether evidence will be required, and, if so, where the action can most conveniently be tried. Then clause (b) could usually be followed if applicable to the particular case.

The motion, therefore, fails and is dismissed. This will not prejudice defendants in renewing the application at the proper time, if so advised.

The correct practice seems to be to move against the statement of claim before pleading, if the motion is made under clause (b). If not made then, it can still be brought up after the cause is at issue, but should not be made till then—and the application will not be prejudiced by the delay because many actions are settled before going to trial, and the motion, though justifiable, may be unnecessary. As the question is new, and the practice has not been considered and defined on this particular point, the costs will be in the cause.

FALCONBRIDGE, C.J.

NOVEMBER 6TH, 1906.

CHAMBERS.

DAVIES v. SOVEREIGN BANK.

Parties—Joinder of Defendants — Pleading—Specific Performance—Motion to Compel Plaintiff to Elect to Proceed against one of two Defendants—One Claim against both Defendants.

Appeal by defendants the corporation of the city of Toronto from order of Master in Chambers (ante 484) dis-

Since that decision the present action has been brought by a ratepayer of the town on behalf of himself and the other ratepayers, against the town corporation and the street railway company.

The statement of claim sets out the facts, which do not seem to be in dispute, and asks a declaration that the town corporation cannot proceed with the arbitration and an injunction restraining the town corporation and the street railway company from proceeding in the matter, and also restraining the town corporation from paying any moneys towards the cost of the arbitration and from taking any steps to take over the railway.

The venue has been laid at Toronto.

The defendants the town corporation delivered their statement of defence on 16th October, and six days later gave notice of motion to change the venue to Berlin, on the ground that the case came within Rule 529 (b).

The defendants the street railway company have not delivered any statement of defence.

The form of the action suggests the question which was raised in *Connor v. Dempster*, 6 O. L. R. 354, 2 O. W. R. 833. It was not necessary to decide it there. While it seems that in these cases there is no "cause of action" as that phrase is commonly understood, yet it may well be that it should appear that any evidence (other than documentary) will be required, the analogy of Rule 529 (b) should be applied, as was held to be right in *Saskatchewan Land and Homestead Co. v. Leadley*, 9 O. L. R. 556, 5 O. W. R. 449.

But, however that may be, it was contended by counsel for plaintiff that the motion was premature if made under Rule 529 (d) and too late if made under 529 (b). If the case comes strictly within sub-sec. (b), then the statement of claim was irregular, and defendants should have moved against it if they thought it worth while to do so: see *Brown v. Hazel*, 2 O. W. R. 784, and Rule 310. Being only an irregularity, it could be waived, and is conclusively waived under Rule 311 if a fresh step has been taken after knowledge of the irregularity. In this case I think the irregularity (if it be one) was waived by the defendants who now move. This is quite different from a nullity, which can never be cured by waiver: see *Hoffman v. Cretar*, 18 P. R. at p. 479.

refusing to quash a conviction of defendant for a violation of the terms of a by-law of the town of Berlin respecting hawkers and pedlars.

W. Proudfoot, K.C., for defendant.
J. E. Jones, for the informant.

GARROW, J.A.:—The point mainly relied on by defendant is that the by-law has fixed so high a license fee (\$75) as to be prohibitive. I have read the evidence, and, while there is some evidence tending to support this objection, and that that was the intention of the town council in fixing so high a license fee, and assuming the objection to be a valid one, there is also evidence to the contrary. In these circumstances, the Divisional Court had, I think, no alternative upon this objection but to affirm the conviction.

The only other ground of importance was as to the construction and effect of the amendments to the original by-law, and as to these I am unable to see any error in the conclusion of the Divisional Court.

Application dismissed with costs.

CARTWRIGHT, MASTER. NOVEMBER 6TH, 1906.

CHAMBERS.

CUMMINGS v. TOWN OF BERLIN.

Venue—Statement of Claim—Naming Place of Trial other than the Proper one under Rule 529 (b)—Irregularity—Waiver by Pleading—Motion to Change Venue under Rule 529 (d)—Time for making — Necessity for Defined Issues—Practice—Costs.

Motion by the defendant town corporation to change the venue from Toronto to Berlin.
J. E. Jones, for applicants.
G. B. Strathy, for plaintiff.

THE MASTER:—The facts of this case appear sufficiently from the judgment in Re Town of Berlin and Waterloo Street R. W. Co., 8 O. W. R. 284.

should not be frustrated or interfered with by provincial legislation of the kind in question.

MAGEE, J., gave reasons in writing for the same conclusion.

MAGEE, J., also concurred.

GARROW, J.A. NOVEMBER 5TH, 1906.

C.A.—CHAMBERS.

STEPHENS v. TORONTO R. W. CO.

Appeal to Court of Appeal—Leave to Appeal from Order of Divisional Court—Practice—Scale of Costs—Conflicting Decisions.

Motion by defendants for leave to appeal to the Court of Appeal from the order of a Divisional Court upon a question of practice as to the estate of costs taxable upon taking money out of Court paid in with the defence.

D. L. McCarthy, for defendants.

W. A. Skeans, for plaintiff.

GARROW, J.A.:—The point is one of considerable practical importance, and, in view of the difference of opinion expressed in the cases of *Chick v. Toronto Electric Light Co.*, 12 P. R. 58, and *Badcock v. Standish*, 19 P. R. 195 (in which apparently the earlier decision was not cited), the leave should be granted. But, as plaintiff acted upon the practice as settled by the case in 19 P. R., I think it is only fair that the leave to appeal should only be on condition that defendants shall pay plaintiff's costs of this motion and of the appeal to this Court in any event.

GARROW, J.A. NOVEMBER 5TH, 1906.

C.A.—CHAMBERS.

REX v. LAFORGE.

Appeal to Court of Appeal—Leave to Appeal from Order of Divisional Court Refusing to Quash Conviction—Special Grounds—Municipal By-law.

Application by defendant for leave to appeal to the Court of Appeal from the order of a Divisional Court (ante 104)

of Attorney-General for Canada v. Attorney-General for Ontario, [1898] A. C. at p. 715, and Canadian Pacific R. W. Co. v. Corporation of Notre Dame de Bonsecours, [1899] A. C. p. 367; and Madden v. Nelson and Fort Sheppard R. W. Co., ib. 626.

The Mechanics' Lien Act of Ontario is extended to railway companies as owners and to railways and other lands with the safeguard in sec. 52:—"The provisions of the Act, so far as they affect railways under the control of the Dominion of Canada, are only intended to apply so far as the legislature of the province has authority or jurisdiction in regard thereto." This was passed in 1896, after the decision in *King v. Alford* (1885).

The effect of this legislation is to operate at once upon the property of the railway—affecting it in rem, and creating a statutory lien on the undertaking for the benefit of the wage-earner: secs. 4, 7, 13. The initial proceedings under the Ontario Act is to place a burden on the lands of the railway in addition to what may be imposed upon them under the Dominion Railway Act, secs. 111, 112, &c., Act of 1903. That appears to me to be a piece of legislation beyond the competence of the provincial legislature.

I foresee, besides, great difficulties in working out the provisions of the Mechanics' Lien Act, as applied even to Ontario railways, under the existing law, which forbids the disposal of a railway piecemeal. To make the local law effective it would appear to be requisite to provide for a sale of the particular part of the land benefited by the work in respect of which a lien is given. The Act as it stands at present, can only be worked out by attributing the lien to all the line of railway lands, and selling the whole as an entire thing, while yet the lien is registered only in the county where the work has been done: sec. 17, sub-sec. 3, and sec. 7. Upon the main point, however, as to the constitutional aspect of the Mechanics' Lien Act, I think the appeal should succeed. It is not a case for costs.

It was suggested, but not strongly argued, that there might be a difference where the federal railway was not a completed and running concern, but only in course of construction. That, however, is not, to my mind, an essential difference—it is still a federal work entered upon and being prosecuted for the advantage of the whole Dominion, and it

For like reasons that make against the sale of a railway under execution, it was held that a mechanic's lien against part of a railway could not be enforced in Ontario, in *King v. Alford*, 9 O. R. 643. And that was the state of the law when the *Mechanics' Lien Act* was amended by extending it in terms to railways. But the machinery supplied by the Act does not provide for working out a sale of the entire undertaking. The remedy seems to be restricted to that part of the railway where the work was done, and if the right of relief to the wage-earner in respect of his lien was analogous to that enjoyed by a vendor of land in right of his lien for the price, relief might be given and worked out by the Court under the provisions of the provincial Act.

But we are precluded by the decision in *King v. Alford* from holding that the mechanic's lien is of like legal character with a vendor's lien. It was there held that the mechanic's lien was operative as a statutory lien issuing in process of execution, of efficacy equal to but not greater than that possessed by ordinary writs of execution. Under a writ of execution against lands the sheriff can only sell what is in his bailwick, and this limited process is not applicable to the sale of a line of railway running through many counties of the province.

Even if the mechanic's lien was to be regarded as a vendor's lien, I question the competency of the province to put that burden upon the lands and property of a federal railway undertaking.

By Dominion statute 4 Edw. VII. ch. 81, the railway company in question was incorporated, and the undertaking was declared by sec. 11 to be a work for the general advantage of Canada. By this enactment it was brought within the exception as to local works and undertakings specified in the British North America Act, sec. 92, No. 10 (c), and thereby placed under the exclusive legislative authority of Canada by virtue of sec. 91, No. 29. Being thus a federal railway exclusively under the legislative control of the Dominion, it is not competent for the local legislature of Ontario to enact any law which would derogate from the status and rights and property enjoyed and held by the federal corporation under its constitution created by the Dominion of Canada. That result follows inevitably, I think, from what has been decided in the earlier case of *Bourgois v. Montreal, etc., R. W. Co.*, 5 App. Cas. 381, and the more recent cases

have happened, the children of Warren are entitled to one-third of the one-fourth of the corpus which would have gone to the children of Henry if he had left children entitled to take, the children of Norman to one-third of the same one-fourth; and that the remaining one-third of the same one-fourth is vested in the trustees upon and subject to the same trusts as are declared in respect of the one-fourth devised to the children of Osborne.

The costs of all parties will be paid out of the trust estate, those of the trustees between solicitor and client.

NOVEMBER 5TH, 1906.

DIVISIONAL COURT.

CRAWFORD v. TILDEN.

Railway—Dominion Undertaking—Mechanics' Liens — Provincial Act—Application of—Constitutional Law.

Appeal by defendants the Guelph and Goderich Railway Company from judgment of CLUTE, J., declaring plaintiff and other lien-holders entitled to a lien upon the lands of the appellants in the county of Huron.

The appeal was heard by BOYD, C., MAHEE, J., MAREE, J.

E. D. Armour, K.C., for appellants.

E. L. Dickinson, Goderich, for plaintiff.

A. M. Stewart, for defendants Piggott & Co.

BOYD, C.:—Apart from special statute, the law of Ontario still is that a railway as a going concern cannot be sold under execution by the sheriff, unless he is able to sell the whole undertaking. It is not competent under judicial process of this kind to sell by piecemeal so as to disintegrate the road. That was recognized as the law by the Privy Council when directing, in *Redfield v. Wickham*, that a railway undertaking might be as a whole sold under execution, according to the proper construction of the Dominion railway law: 13 App. Cas. 473, 475, 476.

Bearing in mind that the shares lapsing or falling of estate, there can be no division of them "in the manner, shares, and proportions heretofore directed" between the remaining sons, for nothing out of the corpus has been given to any of the sons,—they take income only.

It would seem that this provision of the will declared to be intended to make the meaning of the testator more clear only obscures it.

The expression "remaining sons" does not, however, necessarily mean "surviving sons;" it may, and in this case, I think does mean—if it means anything—other sons surviving in person or in stirpes, that is to say, sons surviving in person or in stirpes, a son or sons dying without issue capable of taking under the earlier provisions of the will, and so reading it, there is nothing in the language used to alter the effect of the earlier part of the provision.

"Remaining" is not, I think, so strong an expression pointing to survivorship as "surviving," and yet had the latter been the word used by the testator, there is ample authority for holding in such a case as this that it ought to be read as "other surviving in person or in stirpes;" *Lucena v. Lucena*, 7 Ch. D. 255; *Re Bilham*, [1901] 2 Ch. 169; and, though involving an idea of a survivorship, means surviving in person or in stirpes. See, also, *O'Brien v. O'Brien*, [1896] 2 I. R. 459.

It is not without significance that the words "remaining" and "surviving" are both used in the provision of the will with which I am dealing. Where the testator means "surviving in person" he uses the word "surviving." I refer to the provision as to surviving grandchildren, and it is not unreasonable to infer that if he had meant to convey the same idea when speaking of his sons he would have said "surviving" and not "remaining" sons.

As Osborne is still living, it is not proper to express an opinion as to the destination of the share intended for his children or their issue, if it should happen that there is no issue of his capable of taking.

The result is that, in my opinion, the appeal should be allowed and the order of the Chief Justice should be discharged, and in lieu of it an order should be made declaring that upon the true construction of the will, in the events that

and under exactly the same conditions, and having this equality in view one would scarcely expect to find that when providing for the case of any of these provisions falling to take effect the testator would wittingly have made it possible that children of two of his sons should in any event take each but one-fourth of his residuary estate, and the children of a third son one-half of it, and yet that is the result reached by the judgment appealed from.

If the language which the testator has used bears that meaning, effect must of course be given to it, but before adopting such a construction, it is, I think, the duty of the Court to endeavour to find, if without disregarding or doing violence to any of the provisions of the will that may be done, a meaning which accords better with the general scheme which the testator had in mind.

The only difficulty is created by the expression "remaining sons and their issue" which the testator uses; but, taking the provision of which it forms part as a whole, that difficulty is not, I think, insurmountable.

The lapsed legacies or undisposed of shares are "to be payable and divisible as near as the then existing circumstances will permit in like manner as hereinbefore directed with respect to such residuary estate." In the events that have happened the undisposed of share is the one-fourth of the residuary estate which upon Henry's death would have been divisible between his children and their issue, if he had left any entitled to take. Then what is the manner in which the residuary estate has in the former part of the will been directed to be payable and divisible? It is by a division into equal shares between the families of the 4 sons; it is true that it is one-fourth to each family as the respective heads die, and it is not unlikely that, observing this, the testator used the words "as near as the then existing circumstances will permit" to indicate that there was to be the same equality as prevailed under the original provision, and that the shares were not to be one-fourths.

Had the provision stopped at this point, this would, I think, have been reasonably clear.

Then does what follows make it necessary to give a different meaning to the whole of the provision? As I have said, the difficulty is created by the use of the words "my remaining sons and their issue."

In order, therefore, to provide for the contingency mentioned and probably for the case of a legatee dying in his lifetime, and to prevent an intestacy as to the part of the corpus that might otherwise have been disposed of, the will contains a declaration in these words:

"I declare that all lapsed legacies and shares of my estate under this my will, and all portions of my estate of which but for this provision I might die intestate, shall become part of my residuary estate, and shall be payable and divisible, as near as the then existing circumstances will permit, in like manner as hereinbefore directed with respect to such residuary estate, and this provision shall apply as well to lapsing and accruing legacies and shares as to original legacies and shares and till my estate is finally distributable, my will and intention being that all legacies or shares lapsing or failing of effect shall revert to and be divided among my remaining sons and their issue in the manner, shares, and portions hereinbefore directed, as far as may be possible, and, to prevent an intestacy of any part of my estate, I direct that any portion thereof which at the date of the final distribution shall remain undisposed of shall be equally divided among all my then surviving grandchildren, and the issue then living of any deceased grandchild, such issue to take the part the parent would have taken if living, and if more than one as tenants in common."

The present controversy has arisen owing to Henry Totten having died childless, and his brothers Warren and Norman having predeceased, and his brother Osborne alone having survived, him.

The Chief Justice of the King's Bench treated the words "remaining sons" as meaning "surviving sons," and accordingly determined that the children of Warren and Norman, as these sons had predeceased Henry, were not entitled to share in that part of the corpus which was set free owing to Henry having died childless.

I am unable with great respect to agree with that view. It is manifest from the provisions of the will that equality between the sons as to the income of the residuary estate, and equality between their respective families as to the corpus, is the dominant idea of the testator. Each son has given to him an equal share of the income during his lifetime, and for the family of each son the same provision is made out of the corpus, one-fourth to each in the same events

The judgment of the Court (MEREDITH, C.J., MAHON, J., ANGLIN, J.), was delivered by

MEREDITH, C.J.:—The testator died on 3rd April, 1877, and left surviving him 4 sons, Warren, Henry, Norman, and Osborne. Warren died on 30th December, 1899, leaving 4 children surviving him, all of whom have attained their majority. Norman died on 23rd February, 1899, leaving 2 children surviving him, both of whom have attained their majority. Henry died on 8th February, 1906, without issue. Osborne is still living, and has two children, both of whom have attained their majority.

The testator devised and bequeathed all his property, real and personal, to his executors and trustees upon trust, after payment of his debts, funeral and testamentary expenses, and the expenses of registering his will, and a legacy of \$1,500 to each of his four sons, to pay and divide the net annual income of his "residuary estate" between and among his 4 sons, in equal shares during their respective natural lives. After making these dispositions, provision is made for the disposition of the corpus of the residuary estate in the following words:—

"And on the death of any one of my said 4 sons and on the death of each of them to pay and divide the principal or corpus of one-fourth part of my said residuary estate equally between and among such of the children of the said deceased son as shall attain the age of 21 years, or die under that age leaving lawful issue, the issue of any such deceased child to take the share the parent would have taken if living, and if more than one as tenants in common, but in case any of my said sons so dying shall have only one child who shall attain the age of 21 years or die under that age leaving lawful issue, then I direct that my said trustees shall pay and divide only the one-half part of the said one-fourth part to or among such child or issue."

It is manifest that had the will contained no other disposition providing for the event of there being no child or issue of any deceased child of one or more of the sons entitled to take under the provision of the will which I have just quoted, that part of the corpus which was bequeathed to the children or their issue of these sons would have been undisposed of and would have passed to the next of kin of the testator.

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NOVEMBER 1ST, 1906.

DIVISIONAL COURT.

RE TOTTEN.

*Will—Construction—Distribution of Estate — Shares—In-
come — Corpus—"Remaining Sons" — Survivorship—
Period of Distribution.*

Appeal by the children of Warren Totten, deceased, and of Norman Totten, deceased, from order of FALCONBERG, C. J., 7 O. W. R. 886, declaring that upon the true construction of the will of Daniel Totten, deceased, the respondent Osborne Totten was entitled during his lifetime to the income derived from the principal of the estate of Daniel Totten, deceased, producing the income to which Henry Totten, deceased, was entitled upon his death, and that upon the death of Osborne Totten, the principal was to be divided share and share alike between the children of Osborne Totten who should attain the age of 21 years or die under that age leaving lawful issue, such issue to take the part or share their parent would have taken if living, and if more than one as tenants in common.

E. D. Armour, K. C., for the children of Norman Totten.
N. Somerville, for the children of Warren Totten.
C. A. Moss, for Osborne Totten and his children.
M. C. Cameron, for official guardian, representing unborn children of Osborne Totten, and unborn great-grandchildren of testator.
J. B. Holden, for the Toronto General Trusts Corporation.

like state of facts, had the position of matters been reversed. The practice there would not permit it. Assuming the truth of the facts set out in the statement of claim, where was the tort "committed?"

Rourk v. Wiedenbach, 1 O. L. R. 581, is more like the present case than any other I know of. Counsel for the plaintiff sought to distinguish it upon the ground that if the bailee of the picture knew the terms upon which the bailor held it, the wrong done was to the property of the plaintiff, which was at that time in Quebec; that here the wrong was to the person of the plaintiff. It seems to me that the mere fact of plaintiff receiving his injury in Ontario is not conclusive that the wrong of defendants was committed here—their tort was in manufacturing in Scotland the alleged defective fuse. The moment it left their hands, it may be said a tort was committed. The final stage, the explosion and injury, is only the evidence of the wrong, or defective manufacture of the fuse in question.

The cases cited by the Master are all interesting, but, after all, throw little light upon the application of Rule 162 (e). I am unable to bring myself to believe that the Rule was ever intended to apply to a case like the present, or that it in fact does apply; the result of its application would be altogether too far-reaching.

In my opinion, the learned Master properly set aside the order, and the appeal is dismissed with costs.

TEETZEL, J.

NOVEMBER 7TH, 1906.

WEEKLY COURT.

BOHAN v. GALBRAITH.

Vendor and Purchaser—Contract for Sale and Purchase of Land—Specific Performance—Correspondence — Agent—Completion of Contract—Subsequent Formal Offer to Purchase and Refusal—Effect of.

Motion by plaintiff for judgment on pleadings and admissions filed in an action for specific performance.

J. A. Paterson, K.C., for plaintiff.

W. E. Middleton, for defendant.

TEETZEL, J.:—Defendant, who resides in California, is the owner of 468 and 470 Yonge street, and 3 Grenville street, Toronto, and, I infer from the correspondence, has placed this and other property in the hands of H. Graham & Son as agents to collect the rents and to receive offers of purchase and submit the same to defendant, but they had no authority from him to make sale agreements.

On 9th December, 1905, Graham & Son received from plaintiff and forwarded to defendant a formal written offer for the property, signed by plaintiff, the price offered being \$14,000, payable \$7,000 cash and balance in 10 half-yearly payments of \$700 each, with interest at 5 per cent. A previous offer of \$13,000 on similar terms had been refused.

In reply to the letter enclosing the last offer, defendant, on 15th December, 1905, wrote the following letter to Graham & Son:—

“Dear Sir:—Your offer from Mr. Bohan of \$14,000 for Yonge street is not what I wish to accept. I told you last summer I would not let it go for less than that amount, but I would not care to sell it on payments.

“I have several times told you that I will not have payments on my properties. I might make an exception as to Danforth avenue, only.

“You told me money loans would now be 6 per cent. when I spoke to you about possibility of borrowing to buy more property.

“Therefore, if Mr. Bohan wants the property, he can get his own loan as suggested in your first letter, and pay me \$14,000 cash, or I will take a straight mortgage for 5 years at 6 per cent., payable half-yearly. If he can get it at 5 per cent. himself, he is welcome to do so elsewhere. If he borrows from the same party who had the loan before, his expense would be small, and the title searched free of cost. Please consider this final.”

And on 20th December Graham & Son, with plaintiff's authority, wrote the following letter to defendant:—

“Dear Sir: Your favour of 15th inst. to hand; in reply we beg to inform you that Mr. Bohan accepts the terms named therein, and will pay the \$14,000 in cash. We enclose blank deed in duplicate, which you can fill out and forward with instructions how to dispose of proceeds.

Kindly forward title papers or inform us where they are to be obtained.

"We are glad to get such a good offer, and believe you can, if you wish, reinvest here to good advantage."

When this letter was received by defendant, I would infer that he still had in his possession plaintiff's formal offer of 9th December, which he altered by making the whole of the purchase money payable in cash on 1st February, 1906. That offer had contained these words: "This offer to be accepted by 23rd December, otherwise void, and sale to be completed on or before 1st January, 1906." The defendant altered this language by changing "23rd December" to "15th January" and "January" to "February."

With these alterations defendant returned the offer to Graham & Son, with the following note written by him at the bottom:—

"Dear Sir:—You forgot to send amended offer from Mr. Bohan. I have returned this for signature when re-written."

On 3rd January, Graham & Son got plaintiff to sign an engrossed copy of the amended offer, and enclosed same to defendant in a letter, stating:—

"Dear Sir: As you request, we have had amended offer made out and signed by Mr. Bohan, and forward the same for your acceptance. We did not think this necessary, as, if title papers had been forwarded, Mr. Bohan was ready to pay over the money at any time."

On 9th January defendant wrote Graham & Son as follows:—

"Dear Sirs: Yours of the 3rd inst. enclosing amended offer from Mr. Bohan received, and after due consideration I have decided not to accept it. It will not be necessary for me to give my reasons now, as I will be in Toronto in a month or two and will call on you."

It seems to me that upon the correspondence and papers the two principal questions are: Does the correspondence down to the letter of 20th December disclose a complete contract between the parties? (2) Assuming it does, is defendant entitled to withdraw in consequence of the amended offer of 9th January, signed by plaintiff, which

contained the words: "This offer to be accepted by 15th January, 1906, otherwise void."

It was strongly argued by Mr. Middleton that the letter of 15th December, was at most only in the nature of a quotation of price and terms, and not an offer the acceptance of which would be binding on defendant, and he relied upon *Harvey v. Facey*, [1893] A. C. 552, and *Johnston v. Rogers*, 30 O. R. 150, as supporting this contention. . .

This case is, I think, clearly distinguishable upon the documents from each of the two cases cited, because the letter of 15th December is, in my opinion, not merely a statement or quotation of price, but conveys an offer to sell to plaintiff at the price named.

Plaintiff had made two offers, which were both refused by defendant, and it seems to me the only purpose that can be imputed to the letter of 15th December was to make clear defendant's counter-proposal, and the only terms upon which he would sell. It was not a case of merely answering an inquiry as to lowest price, nor making an original quotation, but an individual link in a chain of negotiations leading to an agreement which both parties contemplated would be entered into.

The letter may, in the light of the previous correspondence, be fairly paraphrased thus: "The terms of Mr. Bohan's offer of \$14,000 for the Yonge street property are not what I wish to accept, because, as you know, I will not accept instalment payments on any property; therefore, my final proposal is that if Mr. Bohan wants the property at that sum, he can have it by arranging his own loan, and paying me \$14,000 cash, or I will take a straight mortgage for the half for 5 years at 6 per cent. half-yearly."

Upon the first question, therefore, I am of opinion that when the letter of 20th December was sent, the parties had concluded a complete contract of sale and purchase.

Then, does what happened afterwards entitle defendant to withdraw? I am of opinion that it does not. There was nothing in the correspondence indicating any condition that plaintiff should sign a further formal offer. He had unconditionally accepted defendant's terms, which only essentially differed from his offer of 9th December in regard to the mode of payment, and it was therefore quite unnecessary for plaintiff to sign a further amended offer.

It is difficult to understand why defendant should have asked for that, except on the assumption that he did not know that the agent's letter of 20th December was binding upon plaintiff. In my view, the sending of the amended offer by plaintiff after the contract was concluded, was simply a supererogatory act, which did not discharge, alter, or add to the contract already made.

Judgment should, therefore, be entered in favour of plaintiff for specific performance as prayed in the statement of claim, and costs.

NOVEMBER 7TH, 1906.

DIVISIONAL COURT.

SCHUEL v. HAMILTON.

Fraudulent Conveyance — Issue as to — Determination in Favour of Validity—Appeal—Evidence that Conveyance Made as Security only—Refusal to Give Relief.

Appeal by plaintiff from judgment of FALCONBRIDGE, C.J., in favour of defendants without costs upon the trial of an issue as to whether a conveyance of land by defendant Hamilton to defendant Fairchild, was or was not void as being in fraud of the creditors of defendant Hamilton.

The appeal was heard by BOYD, C., MAGEE, J., MABEE, J.

L. G. McCarthy, K.C., for plaintiff.

T. Langton, K.C., for defendant Fairchild.

MABEE, J.:—The evidence does not shew any sale of the property by defendant Hamilton to defendant Fairchild; no price was agreed upon, and none of the elements that are always found connected with a sale of lands are present in this case. There were undoubtedly advances made, and I think the property was conveyed, without fraud, to secure such advances, and that the grantee would be entitled to hold the land as security for all moneys advanced to or paid by him upon Hamilton's account, both before

and after the conveyance. In this view plaintiff, I think, would have been entitled to have had the deed cut down to a mortgage, had an account taken, and a sale of his debtor's equity, but the difficulty is that no such case was made upon the pleadings, nor does it seem to have been so presented at the trial, so that, even if it were now open to us at this late date, it is at most discretionary. The case comes before the Court in the form of an issue, directed by the County Judge, and the only matter that seems to be presented by the issue is whether the conveyance was fraudulent, and that has been resolved against plaintiff, and such finding should not be disturbed. The Chief Justice may have regarded, and doubtless did regard, that as the only matter involved in the trial, and the form of the claim, fraud being eliminated, should not now be entirely altered. It might be that defendant, if fraud had not been charged, would, to avoid litigation, have submitted to be redeemed by plaintiff, and in that event he would have been entitled to add his costs to his mortgage debt. The Chief Justice has dismissed the action without costs, and if plaintiff were now permitted to redeem, it could only be upon payment of all defendant's costs.

In view of the course of the litigation, the family relationship of the parties, and the Chief Justice doubtless having considered the matters above indicated, and held plaintiff to the issue presented, notwithstanding my view that the deed was a security only, I think the appeal must be dismissed, but without costs.

BOYD, C., and MAGEE, J., agreed in the result.

NOVEMBER 7TH, 1906.

DIVISIONAL COURT.

SCHAEFFER v. ARMSTRONG.

*Costs—District Court—Unorganized Territory Act, sec. 11
—Action beyond Jurisdiction of County Court—Discretion
of District Court Judge as to Scale of Costs—Application
of Rules of Court.*

Appeal by the plaintiff from the judgment of the Judge of the District Court of Manitoulin, in an action for re-

plevin and conversion of logs, etc., depriving plaintiff of High Court costs, though he succeeded in recovering judgment for recovery of the logs and \$258 damages, and allowing him County Court costs only.

J. E. Jones, for plaintiff.

A. J. Thomson, for defendant.

The judgment of the Court (BOYD, C., MAGEE, J., MABEE, J.), was delivered by

BOYD, C.:—By the interpretation clause "County Court" includes District Court: Rule 6 (b).

By Rule 1216, all the Rules and the practice and procedure in actions in the High Court are made to apply to County Court actions.

By Rule 1130 the Court or Judge has unlimited discretion as to the award of costs—subject to the provisions of the Judicature Act and to the express provisions of any other statute.

By Rule 1137 a lump sum may be awarded for costs by the Court, and this means that costs may be given on the County Court scale even when the action is beyond County Court jurisdiction: see *Palmer v. Perth*, cited in H. & L., 3rd ed., p. 1368.

By sec. 72 of the Judicature Act, no appeal lies in respect of an order as to costs which are by law left to the discretion of the Court.

Now is there "any express provision" in the Unorganized Territory Act, R. S. O. 1897 ch. 109, in contravention of this result? The District Judge has power over costs whether in jury or non-jury cases. In a jury case costs follow the result unless the Judge otherwise orders. In a case tried by himself he has to give costs before any can be taxed. In this case, disposed of without a jury, no costs could be taxed to the plaintiff without the direction of the Judge. His order is to tax on the County Court scale. I do not think that sec. 11 of the Act (ch. 109) is to be read so as to give no alternative between withholding costs altogether, and having them taxed on the High Court scale. I read the section as if it were there expressed, as to costs in actions beyond the jurisdiction of County Courts, that costs awarded to a successful defendant should be taxed

according to the High Court tariff, unless the Court otherwise orders, and costs awarded to a successful plaintiff shall be taxed according to the High Court tariff, unless the Court otherwise orders. There is no express declaration negating such a manner of awarding costs in the District Court. And I think the plain provisions of the Rules, which have the force of statutory clauses, control the general enactments in ch. 109. This decision appears a uniform method of dealing with costs in all the series of Courts of record.

The appeal is dismissed, but, as the point is a new one and fairly arguable, no costs should be given.

JUNE 15TH, 1906.

DIVISIONAL COURT.

BUSH v. PARK.

Lunatic — Magistrate's Commitment of Sane Person as a Lunatic—Judicial Proceeding—Subsequent Discharge—Action for Damages—Malicious Prosecution—Failure to Prove Favourable Termination.

Appeal by defendant Emily Bush from judgment of BOYD, C., upon the findings of a jury, at London on 18th April, 1906.

Plaintiff and his wife Emily Bush, one of the defendants, had been separated for a number of years, living in two separate houses upon the same land, and had for many years been at variance. It was alleged that in September, 1905, on account of the ill-feeling between the parties, defendants conspired to have plaintiff placed in an asylum for the insane, although, as alleged, they knew he was not insane. The plaintiff was on 2nd September, 1905, brought before a justice of the peace, who committed him to gaol, and thence he was sent to the London Asylum for the Insane on 24th October, 1905, and there was kept until 17th November, 1905, when he was discharged on the ground that he was not and had never been insane.

This action was brought to recover damages for false imprisonment, etc., and was tried with a jury, who found against the conspiracy charge, and in favour of defendants Archibald Park and Esther Park, but found against defendant Emily Bush and assessed damages at \$700, for which judgment was entered by the Chancellor.

E. T. Essery, London, for defendant Emily Bush.

J. A. Robinson, St. Thomas, for plaintiff.

The Court (MEREDITH, C.J., TEETZEL, J., ANGLIN, J.), held that the action, leaving out the conspiracy charge, was in effect one for malicious prosecution, and that plaintiff had not proved a favourable termination of the proceedings before the magistrate—the inquiry before the magistrate being a judicial proceeding.

CARTWRIGHT, MASTER.

NOVEMBER 9TH, 1906.

CHAMBERS.

BELL v. GOODISON THRESHER CO.

Venue—Contract as to—Motion to Change—Effect of Statute 6 Edw. VII. ch. 19, sec. 22 (O.)—Application of—Retraactivity—Costs—Preponderance of Convenience.

Motion by defendants to change venue from Barrie to Sarnia, where defendants' head office was situated.

T. N. Phelan, for defendants.

W. A. Boys, Barrie, for plaintiff.

THE MASTER:—The statement of claim is not distinguishable, in my opinion, from that in *Wright v. Ross*, 11 O. L. R. 113, 7 O. W. R. 69. Here, as there, plaintiff is seeking on similar grounds a return of money paid on the agreement, damages for breach thereof, return of plaintiff's notes given thereunder, and cancellation of the agreement. That agreement was made on 28th February, 1905, and supplemented or varied on 23rd December. The original provided that "if any action or actions arise in respect of the said machine or

notes or renewals thereof, the same shall be entered, tried, and finally disposed of in the Court which has its sittings where the head office of the said company is located." It was further agreed that "any action brought with respect to this contract shall be tried at the town of Sarnia, and the purchasers consent to have the venue in any such action changed to Sarnia, no matter where the same may be laid." There can be little doubt (if any) that these last words would be decisive in favour of the motion had it not been for the recent legislation on the question.

By 6 Edw. VII. ch. 19, sec. 22 (O.), it was enacted that no such proviso, condition, etc., shall be of any force or effect; but sub-sec. (2) enacts that "the provisions of this section shall not apply to or be available in any action . . . in any other Court than a Division Court unless and until the defendant therein shall make a motion to change the venue or place of trial according to the practice of such Court."

But it was argued (1) that the statute was not applicable to such a case as the present, and (2) that it was not retrospective, and therefore could not take away from the defendant company their vested right to have the venue changed to Sarnia.

As to the first argument; it may be that such a motion as the present was not in the contemplation of the draftsman, but the words are unambiguous and fit the present case. Nor does there seem any good reason for straining after an interpretation which would make the statute operative only when one party to the contract, i.e., the seller, was taking action. This is plainly a remedial enactment, and is to be interpreted so as to advance the remedy. Hardcastle says, 3rd Eng. ed., p. 70: "Almost every statute may be described as remedial, since its passing presupposes some grievance which the Act is intended to rectify." What that grievance is in these cases is only too manifest, and is shewn in *Wright v. Ross*, supra.

On the second ground, also, I think the motion must be dismissed. So far as I can see, the question of where an action is to be tried is clearly a matter of procedure only, and there is no such vested right created by the agreement as would prevent the operation of the statute. The question is dismissed in *Hardcastle*, supra, p. 359, where the cases are given. The leading one is *Wright v. Hale*, 6 H. &

N. p. 230. There it was held that a much more substantial right of a successful plaintiff was taken away by an Act passed after the commencement of the action. See too in our Courts, a case of Bank of Montreal v. Scott, 17 C. P. 358; cases cited on the argument in Wright v. Hale, supra; and Maxwell on Statutes, 4th ed. (1905), pp. 336 et seq.

So far as I am aware, the effect of the Act on existing contracts has now come up for the first time. Therefore, while the motion is dismissed, costs will be in the cause.

. . .

There was no attempt to argue that there was not a preponderance of convenience in favour of Barrie.

CARTWRIGHT, MASTER.

NOVEMBER 9TH, 1906.

CHAMBERS.

YAPP v. PEUCHEN.

Pleading—Defences to Counterclaim—Motion to Strike out Paragraphs—Contract—Breach—Agency—Conclusion of Law—Joint Agreement—Foreign Defendants—Submission to Jurisdiction by Pleading to Counterclaim.

Motion by defendants (plaintiffs by counterclaim) to strike out certain paragraphs of the statements of defence of the defendants by counterclaim.

G. B. Strathy, for applicants.

E. D. Armour, K.C., for respondents.

THE MASTER:—This action is on a contract made on 1st September, 1902, between plaintiff and the original defendants. Under this plaintiff was to buy from defendants in each of the ensuing 5 years 250,000 lbs. of acetic acid at 8½ cents per lb. This quantity defendants were to furnish if and as required, and it was stipulated that if either side made default the other party was to pay 4½ cents per lb. as liquidated damages.

Up to a certain time plaintiff made default and has paid defendants for same \$2,371.62. But plaintiff alleges that

for several months prior to the commencement of this action, in July last, defendants were in default, for which he seeks to recover \$15,076.45.

Defendants say that they fulfilled their contract, and that if, in any respect, they committed any breach, such breaches did not damage plaintiff, and in any case were waived, and they then set up that the object of the agreement sued on was that defendants should supply with such quantities of acid as they might require certain other persons (who were afterwards brought in as defendants by counterclaim), and that they did so apply them. Finally they counterclaim as above to the following effect. They first set out in extenso an agreement also made on 1st September, 1902, between plaintiff and the added defendants, and say that by and under the authority of this agreement plaintiff entered into the other and first agreement as agent for the other parties who were added as defendants to the counterclaim. And the same damages are asked as against plaintiff and the others as plaintiff claims against the original defendants.

Some of these added defendants reside in the province of Quebec. They were served under Con. Rules 162 and 209, and have all put in statements of defence without objecting to the jurisdiction. These statements of defence are objected to, and the present motion is to strike out certain paragraphs in each of them. . . .

It will be sufficient to deal with the defence to the counterclaim of the original plaintiff, as the others were similar to it. The paragraphs attacked are numbers 2, 3, 4, and 5.

Paragraph 1 denies that plaintiff was acting as agent for the added defendants in making the agreement with original defendants.

Paragraph 2 says that the original defendants were not parties to the agreement set out in their counterclaim, and are therefore not entitled to any benefit thereunder.

It is objected that this latter clause is a statement of law, and so improper. But, however that may be, it is not in any sense embarrassing, and as to this the motion fails.

Paragraph 3 is as follows:—"The plaintiff further says that if the defendants are entitled to sue for anything contained in or arising out of the said agreement set out in the counterclaim, they are not entitled to set it up by way of

counterclaim in this action." On its face it seems open to the objection that this, if a defence, should have been raised by a motion to strike out the counterclaim. But it was explained to mean that if the agency of plaintiff was not established, then the counterclaim must fail. If that is so, then it seems to be of no service to the parties. It does not state any fact on which they rely but only a conclusion of law.

Paragraph 4 is in the same way explained to mean that in any case the agreement relied on in the counterclaim was a joint agreement, and that some of the parties had withdrawn, so that this agreement was at an end. If it will be of any assistance to defendants, this paragraph can be made more precise by way of particulars.

Paragraph 5 alleges that many of the added defendants reside and carry on business in Quebec, so that they should not in any case be made parties by counterclaim.

This seems clearly bad under *Preston v. Lamont*, 1 Ex. D. 361, unless there is a difference between a person brought in by writ and one brought in by counterclaim. It was contended that this was the case, because here there was no writ and therefore no appearance, and consequently no submission to the jurisdiction.

This, however, seems to be opposed to the wording of Con. Rule 249, and is also at variance with the uniform practice.

In these cases the added party is not served with a writ but only with the counterclaim, which is in place of the writ and has the same effect.

In the case of a foreign defendant made so by counterclaim, if he puts in a defence, he cannot therein or afterwards question the propriety of the service. See *Dunlop Pneumatic Tire Co. v. Ryckman*, 5 O. L. R. 249, 2 O. W. R. 699, 820. There it was said by Street, J., 5 O. L. R., at p. 255.: "None of the parties defendants to the counterclaim . . . have pleaded to it or admitted the jurisdiction of the Court." It would seem from this that by pleading the defendants have admitted the jurisdiction of the Court over them personally. See *Boyle v. Sacker*, 39 Ch. D. 249. This does not debar them from shewing hereafter, if they can, that the Court has jurisdiction over the subject matter, as in *Gunn v. Harper*, 2 O. L.

R. 611, at p. 621. See also *Stokes v. Grant*, 4 C. P. D. 25, 28.

In my opinion paragraphs 5 and 3 should be struck out, but not paragraph 2. Paragraph 4 should be more precise if required by the other side. The defendants may amend their defences to the counterclaim if they desire to do so. Costs will be in the cause. The other defences will be dealt with in the same way.

MACMAHON, J.

NOVEMBER 9TH, 1906.

TRIAL.

CARMAN v. WIGHTMAN.

Mortgage — Assignment — Agreement—Executors—" Acting Executor"—Solicitors—Investment of Funds—Liability for Loss.

Action by R. B. Carman against the executors of the will of John Wightman to recover the amount due upon a mortgage, and counterclaim by defendants against R. B. Carman, James Leitch, and R. A. Pringle, for malinvestment of funds, etc.

R. Smith, Cornwall, and A. Langlois, Cornwall, for plaintiff and defendants by counterclaim.

D. B. MacLennan, K.C., and C. H. Cline, Cornwall, for defendants.

MACMAHON, J.:—One Farquhar McCrimmon on 27th February, 1889, mortgaged to Patrick Purcell the north half of lot 27 in the 3rd concession of the township of Lancaster, to secure the repayment of \$2,000 in 5 years, with interest at 6 per cent.

On 23rd October, 1891, McCrimmon conveyed the mortgaged land to John Wightman, in consideration of \$5,300. The conveyance is made free from all incumbrance, "save and except a mortgage to Patrick Purcell, dated 27th February, 1889, upon which \$2,000 is payable, which sum is deducted from the consideration of \$5,300 within mentioned."

On 8th March, 1893, John Wightman and his wife (to bar dower) conveyed this land to his son John Wightman the younger, the consideration being natural love and affection and \$1. The grantor covenants that the grantee shall have quiet possession of the land free from all incumbrances, and that he has done no act to incumber the lands.

John Wightman the younger . . . in 1892 was let into possession of the land by his father, and has remained in uninterrupted possession ever since.

John Wightman the elder died on 15th April, 1897, having on the 9th of that month made his will, which contains the following direction: "I direct that out of the moneys, securities for moneys, etc., in the hands of Leitch & Pringle the mortgage now standing upon the property of my son John Wightman be fully paid and discharged."

In January, 1898, the interest on the mortgage given by McCrimmon to Purcell being largely in arrear, the solicitors of the Purcell estate served notice under the power of sale in the mortgage, or the copy of a writ which they had issued, on Mr. McNaughton, one of the executors, and upon William Wightman, who was living with his mother on the homestead farm. . . . Immediately after the service of this notice or writ, a consultation was held between the two executors, Mrs. Wightman and Mr. McNaughton, and it was concluded that some immediate action should be taken, and Mr. McNaughton and William Wightman (at his mother's request) came to Cornwall and saw Mr. Pringle and wanted to obtain from him sufficient money to meet this claim of the Purcell estate. . . . One of them had a copy of the notice or writ, which was given to Mr. Pringle.

Mr. Pringle said that the firm of Leitch & Pringle had not sufficient funds of the Wightman estate in their hands to pay the whole amount due on the Purcell mortgage, but they had \$419.45, which they would pay on account of the interest, which would leave a balance of \$2,200 due for the principal and interest. Mr. Pringle said he would see Judge Carman and ascertain if he had \$2,200 to lend, which would be sufficient, with the \$419.45, . . . to pay off the Purcell mortgage. Mr. Pringle saw Judge Carman, who told him that his (Carman's) wife could let the Wightman estate have the \$2,200, and he gave Mr. Pringle a cheque for the amount, he (Carman) supposing he would receive a new mortgage from the executors of Wightman. In this nego-

tiation with Judge Carman, Mr. Pringle was acting solely as the agent of the executors of Wightman.

McNaughton and William Wightman were told of the arrangement . . . and I think it is due to Mr. Pringle to say that, although Leitch & Pringle had in their hands, as solicitors of the Wightman estate, more than the \$419.45, he was quite pronounced in his statement to them that the balance of the money would require to be raised from an outside source, and that was why he suggested applying to Judge Carman to lend it.

Judge Carman said he consented to make the advance on condition that the balance due on the Purcell mortgage should be payable one-half in one year and the other half in two years, for the reason, I suppose, that he did not desire to have the money repaid sooner, in the event of the executors desiring to obtain a loan on more advantageous terms. Hence the agreement of 15th January was entered into.

It is beyond question that the agreement was read over and fully explained to Mr. McNaughton, although he apparently had forgotten a good deal of what took place between himself and Mr. Pringle. . . .

The whole matter is set out in the recital to the agreement as to the ownership of the property by the late John Wightman, subject to a mortgage to Purcell for \$2,000; that there was now due on the mortgage \$2,200; and that the executors of Purcell were making an assignment of the mortgage to Judge Carman. The . . . executors of Wightman covenanted to pay the amount of the mortgage one-half in one year and one-half in two years, with interest payable half-yearly.

Mr. McNaughton, on 17th March, 1904, replying to a letter of Judge Carman of the day previous . . . said, "I will attend to it at once." On 22nd June, 1904, Judge Carman wrote again about payment of the mortgage, and Mr. McNaughton replied on the 24th, saying: "Perhaps you are not aware that Leitch & Pringle had a few hundred dollars more of Wightman's money than was required to pay that mortgage. They claimed it was impossible at that time to collect enough to pay MacLennan, and they suggested that we get the money from you until they could arrange for Wightman's money, and that the interest of one would meet the interest of the other. I agreed to that, and left the matter in their hands, and Wightman supposed

everything was arranged, and so did I until I got your first letter. Something must and will be done soon, and I hope you will not take any proceedings against us without further notice. I am very sorry you have this trouble getting your money, which should have been paid long ago." . . .

McNaughton said he was quite satisfied that the words "acting executor" were not in the document when he signed it. The agreement is said to have been in duplicate, and there is evidence that a duplicate of it was thrown off by the typewriter, and Mr. Pringle supposed that the duplicate was given to Mr. McNaughton to shew his co-executor. Mr. Pringle said that he desired its execution by the co-executor, but Mr. McNaughton stated to him that it was unnecessary to ask Mrs. Wightman to sign it, that she had not interfered in any way in the estate, and he was the acting executor, and therefore all that was necessary was that he should sign it in order to bind the estate; and, in consequence of that statement being made, Mr. Pringle says that the words "acting executor" were added. I find that the words were added before execution by Mr. McNaughton. . . .

On 21st March, 1901, the executors of Wightman, through Leitch & Pringle, paid to Judge Carman, \$426.98 in full of interest up to 15th January, 1901, and on 15th July, 1904, they paid, through Leitch & Pringle, \$505.75, being the interest up to 15th June, 1904. . . .

By the agreement entered into with Carman on 15th January, 1898, no new liability was created by the executors of Wightman. The executors of Purcell had commenced proceedings to enforce their claim under the McCrimmon mortgage, which John Wightman the elder had impliedly covenanted to pay. And it is clear from the will of John Wightman that he intended that the land which he had conveyed to his son John should be freed from that incumbrance. The executors regarded it as a liability of the estate, and so treated it, for they arranged that the McCrimmon mortgage should be transferred from the Purcell estate to Carman, and entered into the agreement, already referred to, to pay that mortgage.

If John Wightman had lived for say two years after the making of his will, and in the meantime had withdrawn all the moneys and securities from the hands of Leitch & Pringle, it is, I consider, clear that the executors must have

satisfied the McCrimmon mortgage out of the general assets of the estate. And because Leitch & Pringle were not, at the time the Purcell estate were proceeding either to sell the land under the mortgage or eject John Wightman the younger from the land, in funds to pay off that mortgage, the executors were bound under the terms of the will to protect him against a sale of his land or ejectment therefrom.

Upon the facts as disclosed . . . *Manley v. London Loan Co.*, 23 A. R. 139, *Canada Landed Co. v. Shaver*, 22 A. R. 377, and *Campbell v. Morrison*, 24 A. R. 224, referred to by counsel for defendants, have no application here.

I must hold that the estate of John Wightman the elder is liable to Carman for the amount due on the mortgage and interest thereon. . . .

Now, in relation to which is known as the Gillespie mortgage: Messrs. Carman, Leitch, & Pringle were acting as solicitors for the late Mr. Wightman, and in 1882 they lent out considerable sums of money for him. Plaintiff Carman left the firm in 1885, and was then appointed Judge of the County Court. Among the investments made was a loan of \$495 on a house and lot in the village of Newington, the lot having a frontage of 66 feet by a depth of 150 feet. Mr. Duval, who lived at Newington and knew the property, said the main building was 20 by 24, with a kitchen and outhouses 18 by 30. Mr. Monro, the agent of the Royal Insurance Co.—which is a rather conservative institution—insured the house for \$500. Mr. Leitch said he knew the building very well, and his idea was that the house cost some \$800. He was satisfied from his knowledge of the property in that district, and after consulting Mr. Munro, who knew the village and inspected the property, and frequently acted as valuator for the late John Wightman, . . . that the amount was a fair one to lend on the property. Unfortunately, a few years after the loan was made, property in the village began to depreciate in value, and the house itself, by reason of no expenditure being made for repairs, had become somewhat dilapidated, so that when it was sold in 1892 the best price that could be obtained was \$375.

At the time the loan was made, it was regarded as a fair investment, and the depreciation which took place was unlooked for, and Carman, Leitch, & Pringle should not

be held liable for negligence or want of care in making that investment.

In addition, Mr. Leitch said that Wightman had gone to see the property after the investment was made, and was quite satisfied with it; and when it was discovered, in after years, that it could not be readily sold, he said he did not impute any negligence to the firm, and would bear the loss himself.

In these circumstances, I must hold that Carman, Leitch, & Pringle are not liable for any loss that resulted from that investment. . . .

By consent of counsel, there will be judgment in favour of the plaintiffs by counterclaim against James Leitch and Robert A. Pringle, defendants by counterclaim, for \$2,300 with costs of the counterclaim.

The original defendants to pay plaintiff's costs of the action.

FALCONBRIDGE, C.J.

NOVEMBER, 9TH, 1906.

TRIAL.

ARMSTRONG v. SHERLOCK.

Landlord and Tenant—Distress for Rent—Suspension of Remedy—Promissory Note — Rent of Chattels—Abatement of Claim—Illegal Distress—Excessive Distress—Detention of Chattels—Damages—Counterclaim.

Action for illegal and excessive distress and detention of goods. Counterclaim for rent, etc.

C. Kingstone, St. Catharines, for plaintiff.

H. H. Collier, K.C., for defendant.

FALCONBRIDGE, C.J.:—The parties differ as to the kind of note which was to have been given, i.e., whether it should or should not be indorsed by some responsible person other than plaintiff and his wife, and so plaintiff fails to prove an agreement to suspend the remedy by distress during the currency of the note, of which agreement the note, if accepted, would have been some evidence.

The amount of rent due was in fact fixed between the parties as being \$231. Defendant issued her warrant to the bailiff for . . . \$393, improperly assuming to include \$162 as for rent of certain tools, but, by notice served on plaintiff several days before the sale, defendant undertook not to make out of the goods more than \$231. No tender of this true amount had been or was subsequently made by plaintiff.

Plaintiff has not established that there was an excessive distress, nor that there was any irregularity or unlawful act in the appraisement or sale of the goods.

Plaintiff had in his possession small tools of his own and larger ones which were the property of defendant. Some of defendant's tools, on a separation being made by plaintiff himself, were ascertained to be not on the premises but in some other place where plaintiff had been using them, and the suggestion was made by the bailiff that plaintiff could get his own tools when he brought back defendant's, and plaintiff acquiesced in this arrangement. His tools were not, in fact, distrained, were not included in the inventory, and were delivered to him before the sale.

If any special damage had to be awarded in respect of the alleged detention of the tools, it would have been assessed at an inconsiderable sum.

The same remark applies with greater force to plaintiff's books of account, which were not distrained, but locked up in the shop for a while and afterwards returned to him.

Plaintiff has not established any cause of action.

Defendant is entitled to recover on the counterclaim . . . \$182. . . .

Action dismissed with costs, and judgment for defendant for \$182 with costs.

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ANGLIN, J.

NOVEMBER 10TH, 1906.

TRIAL.

FISCHER v. BORLAND CARRIAGE CO.

Company—Subscription for Stock—Promissory Note given for Price—Misrepresentation — Condition—Absence of Allotment—Acceptance of Plaintiff as Shareholder — Estoppel—Recovery on Note.

Action for delivery up and cancellation of a promissory note given by plaintiff in payment for stock in the defendant company. Counterclaim to recover the amount of the note.

R. S. Robertson, Stratford, for plaintiff.

J. C. Makins, Stratford, for defendant.

ANGLIN, J.:—The making of the note is admitted. Plaintiff pleads that it was obtained by misrepresentation, and also that it was taken upon condition that, if plaintiff should not before maturity of the note receive certain moneys owed him by his brother, the note should be void and should be returned to him, and his obligation to take and pay for stock should be cancelled. The evidence failed to establish either of these obligations. No misrepresentation was proved; and the note was not taken upon any such condition.

But in the course of the trial it appeared that the directors of defendant company had by resolution, not stating any terms, authorized the secretary-treasurer, one Mil-

ler, to issue and sell some \$40,000 worth of stock for the company; that he had engaged one Farrow to sell the stock as his sub-agent; that, without any authority from, or communication with the directors, Farrow had made an agreement with plaintiff for the sale to him of the stock in question, taking in payment his promissory note payable to defendants for the whole purchase price, and agreeing on behalf of defendants for renewals of such note if plaintiff should require them. . . . Miller, upon being notified of this arrangement, immediately issued a certificate to plaintiff for the number of shares he had agreed to take as paid-up stock, took his receipt for such certificate, entered plaintiff as a shareholder in the company's stock ledger, and placed the note in question under discount with a bank, its proceeds being put to the credit of defendants. Nothing further occurred until the note matured. In response to demands made by the bank for payment, plaintiff did not dispute his liability, and he now says that the only reason he has not paid, and objects to pay, is that he has not received the money which he had expected from his brother. Indeed when seen by Farrow, after the note had been charged up by the bank against defendants' account, he promised Farrow, whose statement I accept, to come in next day and pay defendants \$100 on account.

It is now urged, though no such plea appears on the record, that there was no allotment of stock to plaintiff; that he never became a shareholder; and that the consideration for his note therefore failed. Assuming that plaintiff should be allowed by amendment to seek delivery up and cancellation of his note upon this ground, I am of opinion that it cannot prevail.

While the resolution of the board of directors authorizing Miller to sell stock may have been entirely ineffective as a delegation to him of their discretion, as to the persons to whom and the terms upon which shares should be allotted, and while the handing over of the stock certificate and the taking of plaintiff's note might not have been binding on them, had they promptly repudiated the transaction, defendants in this case have seen fit to confirm what their agent, Miller, did. They accepted and discounted plaintiff's note; they allowed him to hold a shareholder's certificate; they entered him upon their stock book as a shareholder; they even pressed their claim against him upon the note be-

fore he repudiated liability. By all these steps they ratified and confirmed what Miller had done, and estopped themselves from contesting plaintiff's status as a shareholder. Assuming that plaintiff might at some earlier stage have effectively repudiated liability, his attempt to do so was entirely too late to succeed. It was made after the company had, by acts which admit of no other construction, fully recognized his position as a shareholder, and had conclusively ratified and accepted the contract which Miller had purported to enter into on their behalf. . . .

Action dismissed with costs. Judgment for defendants on their counterclaim with costs.

NOVEMBER 12TH, 1906.

DIVISIONAL COURT.

O'KEEFE BREWERY CO. v. GILPIN.

*Sale of Goods—Action for Price—Alleged Inferiority of Part
of Goods Supplied—Failure to Return.*

Appeal by defendant from judgment of County Court of York in favour of plaintiffs in an action for the price of beer, etc., sold and delivered by plaintiffs to defendant.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, J., MABEE, J.

T. E. Godson, Bracebridge, for defendant.

W. R. Smyth, for plaintiffs.

FALCONBRIDGE, C.J.:—The trial Judge has manifestly given credit to Hill's account of the transaction in preference to defendant's; and I see no reason why he should not have done so. Hill states that on the second occasion of complaint by defendant, he told defendant to leave the beer there, and if it did not come right inside of a year there was no use keeping it, and that if it did not "come back," i.e., mature, defendant would have to ship it back, and he would get credit for it.

Now, defendant never did ship it back, nor take any steps to see that his successor in the business did so; but he left his successor in possession of the goods without giving plaintiffs any further notice of his intention with reference to the goods.

In any aspect of the case, one-half of the value of the consignment is represented by the bottles and cases, and one-half by the liquid contents, and the Judge has correctly found that defendant has not discharged the onus which lay on him of shewing that he had returned these "empties;" and the 22 cases being returned in July, 1901, would seem to indicate that, to that extent at least, the goods complained of were used.

Appeal dismissed with costs.

BRITTON, J., gave reasons in writing for the same conclusion.

MABEE, J., also concurred.

NOVEMBER 12TH, 1906.

DIVISIONAL COURT.

SOVEREEN MITT, GLOVE, AND ROBE CO. v. WHITE-SIDE.

Company—Directors—Filling Vacancies in Board—Quorum—Special Meeting of Shareholders—Injunction.

Appeal by plaintiffs from order of MACMAHON, J., 8 O. W. R. 279, dismissing motion to continue an interim injunction restraining defendants, shareholders of plaintiff company, from electing at a meeting of the shareholders called for 4th August, 1906, directors of the company to fill the vacancies caused by 4 directors ceasing to be shareholders.

J. Bicknell, K.C., for plaintiffs, the company and the remaining 3 directors, contended that the shareholders had no power to fill vacancies, but only the "board of directors."

i.e., the remaining 3 directors, who however were by the by-laws of the company, not a quorum of the Board.

G. H. Kilmer and L. F. Stephens, Hamilton, for defendants, contra.

THE COURT (MULOCK, C.J., ANGLIN, J., CLUTE, J.), held that the 3 remaining directors had not power to fill up the vacancies in this case, having regard to the fact that 4 directors were required to constitute a quorum; and the directors having failed, for whatever reason, to fill up the vacancies, the shareholders had the power to do so at a special meeting.

Appeal dismissed with costs, and judgment pronounced dismissing the action with costs, counsel submitting to the appeal being turned into a motion for judgment.

MACWATT, Co.C.J.

OCTOBER 27TH, 1906.

BRITTON, J.

NOVEMBER 13TH, 1906.

CHAMBERS.

REX EX REL. HUNT v. GENGE.

Municipal Elections—Motion to Avoid Election of Reeve — Delay for Nine Months after Relator's Knowledge of Disqualification—3 Edw. VII. ch. 18, sec. 33 (O.)—Construction—Dismissal of Motion—Interest in Contract with Corporation.

Motion by the relator to void the election of the respondent as reeve of the village of Alvinston, in the county of Lambton.

The motion was heard by MACWATT, senior Judge of the County Court of Lambton, on 12th October, 1906.

A. Weir, Sarnia, for the relator.

R. V. Lesueur, Sarnia, for the respondent.

MACWATT, Co.C.J.:—As this seems to be the first case to come up under the amendment made by 3 Edw. VII. ch.

18, sec. 33, whereby the following words were added to the section: "or in case at any time the relator shews by affidavit to such Judge reasonable ground for supposing that any member of the council of a local municipality or of a county council has forfeited his seat, or has become disqualified since his election," I consider it advisable to give my reasons for deciding in favour of the respondent. The section as amended is now in the Consolidated Municipal Act, 1903, 3 Edw. VII. ch. 19, sec. 220.

Prior to 1903 a relator had to move within 6 weeks after an election, or within one month after acceptance of office by the person elected; and if he did not so move, the person so elected held his seat.

Section 80 of the Consolidated Municipal Act, 1903, reads as follows: " . . . No person having by himself . . . an interest in any contract with or on behalf of the corporation, or having a contract for the supply of goods or materials to a contractor for work for which the corporation pays or is liable directly or indirectly to pay, or which is subject to the control or supervision of the council or an officer thereof on behalf of the council, or has any unsatisfied claim for such goods or materials, and no person who either by himself or with or through another, has any claim, action, or proceeding against the municipality . . . shall be qualified to be a member of the council of any municipal corporation."

This section was doubtless passed "to prevent any one being elected to a municipal council whose personal interest might clash with those of the municipality:" *Rex ex rel. McNamara v. Heffernan*, 7 O. L. R. 289, 3 O. W. R. 431. The operation of the section is not to be lightly restricted where it is intended to carry out the spirit of the section by proceeding promptly after knowledge of a violation of its requirements; but where there has been acquiescence, as well as laches and unreasonable delay, I take it the section should not be allowed to stand in the way.

In March, 1903, the municipality entered into a lease with one Pavey by which a hall was leased for the use of the corporation and school board of the municipality for a term of 3 years, at a rental of \$25 per annum. This lease expired on 7th March, 1906, and Pavey gave permission about that time for the council to hold one meeting in

his hall after its expiration until arrangements then on foot were carried out. Early in April last the hall was leased for a further period of one year at the same rental, the term commencing from 7th March, 1905. There is no written lease or contract with the respondent, and nothing appears in the minutes at any time as to the supply of gas or light by him or any one else for the council hall.

The relator is the president of the power company which supplies electric light to such of the inhabitants of the municipality as contract for it; and the respondent is the owner apparently of an acetylene gas plant which supplies gas to himself and to one or two halls in the village.

He has been paid, as appears by the village auditors' reports for 1904 and 1905, \$5 per year by the municipality for lighting during the years 1903, 1904, and 1905. The cheque for the year ending 7th March, 1906, is dated 5th March, 1906, for the sum of \$5.75, of which \$5 was for lighting.

The respondent was elected reeve on 8th January, 1906, and had proceedings been taken within 6 weeks of that date, from the evidence and the cheque, I should have been of the opinion that he had forfeited his seat.

It was known to the relator since March, 1903, that the respondent had been paid \$5 a year for lighting the hall used by the council of the municipality, as appears by his cross-examination. It was known to many others, among them Mr. Gilroy, who gave evidence before me. He was reeve in 1903, 1904, and 1905, and ran against the respondent for that office for 1906, but was defeated.

The relator also had knowledge that since March last the council room was lighted by gas in the same manner as before, yet until 29th September he does not move, although in his cross-examination he admits that in March or April last he stated more than once that he could unseat the respondent for supplying gas to the council chamber.

The cheque was in payment in full of the contract, if any, which expired on 7th March, 1906. No doubt the respondent was disqualified when elected because he had an unsatisfied claim against the municipality, and this claim was in part at least for services rendered after his election.

A relator should move within a reasonable time after the necessary facts come to his knowledge. I cannot imagine that the legislature by the amendment above quoted intended to allow a person to act at any time when spite, spleen, pique, or any other unworthy motive moved him, and I take it the time in which to move may be fairly taken to have been defined by it as 6 weeks at the outside.

If this be so, the relator is too late in moving on 29th September, on this ground, when he knew the facts in March last.

The respondent is only elected for one year, and has less than 3 months to serve; that is also a reason why the relator should have moved promptly.

The principle of finality was recognized and affirmed by Rose, J., in *Regina ex rel. McKenzie v. Martin*, 28 O. R. 523.

As to what has been done since March last, I am of opinion that there is not sufficient evidence to disqualify the respondent.

There was no written or even verbal contract, nor any entry in the minutes, and neither the clerk nor Mr. Gilroy knew anything more than that the light has been supplied, but by whom or on what terms does not appear. It may have been still furnished by the respondent; but, even then, he may not be intending to make any charge, and if he wishes to supply it gratuitously I hardly think that would be a ground for his disqualification at this late day.

Under the first lease there was a verbal arrangement with respondent which became executed by supplying gas and being paid for it. Under the new lease there is not a tittle of evidence as to lighting, so that, while the facts may be as contended for by the relator, they have not been shewn.

Why was not the respondent examined, or some sufficient evidence given by examination of other members of the council, or in some way?

The onus is on the relator, and he has not satisfied it, in my opinion. It is not enough for him to say that the

respondent is disqualified, and to require him to disprove it. A learned Chief Justice of our Courts was often heard to say, "The jury must not guess," and I do not feel disposed to do any guessing in this case.

There is no doubt that the relator has been guilty of laches, and that he has acquiesced in the respondent's actions for over 9 months without question. I have not considered it necessary to go into the question of the status of the relator, argued by Mr. Lesueur, as I have decided that the respondent holds his seat on other grounds.

As to acquiescence, see *Rex ex rel. Tolmie v. Campbell*, 1 O. W. R. 268, 4 O. L. R. at p. 28; *Regina ex rel. Mitchell v. Adams*, 1 C. L. Ch. at p. 205; *Regina ex rel. Pomeroy v. Watson*, 1 C. L. J. 48.

As to laches, see *In re Kelly v. Macarow*, 14 C. P. 313, 457.

As to status of relator, see *Regina ex rel. Campbell v. O'Malley*, 10 C. L. J. 250.

Mr. Weir cited: *Rex ex rel. Moore v. Hammill*, 7 O. L. R. at p. 603, 3 O. W. R. 642; *Neill v. Longbottom*, 1 P. R. 114; *Regina ex rel. Shaw v. McKenzie*, 2 C. L. Ch. 36; *Regina ex rel. Davis v. Carruthers*, 1 P. R. 114; and *Regina ex rel. Coleman v. O'Hare*, 2 P. R. 18.

Mr. Lesueur cited: *Evans v. Smallcombe*, 37 L. J. Ch. 793; *Rex ex rel. Hart v. Street*, 1 W. L. R. 202; *Regina ex rel. Regis v. Cusac*, 6 P. R. 303; and *Regina ex rel. Rosebush v. Parker*, 2 C. P. 15.

The motion is therefore dismissed with costs to the respondent.

The relator appealed, and his appeal was heard by BRITTON, J., in Chambers, on 13th November, 1906.

Grayson Smith, for relator.

L. G. McCarthy, K.C., for respondent.

BRITTON, J., dismissed the appeal with costs.

BRITTON, J.

NOVEMBER 13TH, 1906.

WEEKLY COURT.

RE PORTER.

*Will—Construction—Devise — Restraint on Alienation —
Validity.*

Motion by beneficiary and adult remainderman under will of Hugh Porter for order declaring construction of will.

J. H. Spence, for applicants.

F. W. Harcourt, for infant remaindermen.

BRITTON, J.:—Hugh Porter made his will on 3rd February, 1887, and died on 12th August in same year.

The clause of the will of which construction is asked is as follows: "I give, devise, and bequeath lot number 13 in the 10th concession of the township of Grey, in the county of Huron, to my son Hugh Porter, his heirs and assigns, to have and to hold the same unto the said Hugh Porter, his heirs and assigns, to and for his and their sole and only use forever, subject to the condition that the said Hugh Porter shall not during his lifetime either mortgage or sell the said lot thus devised to him."

Hugh Porter now asks that the condition against his mortgaging or selling be declared invalid.

In *Heddlestone v. Heddlestone*, 15 O. R. 280, MacMahon, J. decided, 10th February, 1888, that, in the case of lands devised to three sons subject to the condition that these lands should not be disposed of by them, "either by sale, by mortgage, or otherwise, except by will to their lawful heirs," the condition was invalid, and that the devisees were entitled to hold the land freed from the restriction. The difference between the *Heddlestone* case and the present is that there was in that case the additional restraint upon the devisee against disposing of the land by will except to his lawful heirs. That case was considered, as indeed were all the recent cases upon the point, by my brother Magee in *Re Martin and Dagneau*, 11 O. L. R. 349, 7 O. W. R. 191.

In that case the words under consideration were, "None of my sons will have the privilege of mortgaging or selling their lot or farm aforesaid described," and the learned Judge held that this restraint on alienation was valid.

I am unable to distinguish between the present case and the one last cited, and so must follow it. In view of the many cases in which the line of distinction and difference is fine, I would not be sorry to have them now considered afresh by an appellate Court.

Restriction valid.

No costs.

NOVEMBER 13TH, 1906.

DIVISIONAL COURT.

HOBIN v. CITY OF OTTAWA.

Highway—Non-repair—Injury to Person—Loose Iron Lid of Catch-basin in Sidewalk—Absence of Defect in Construction—Negligence—Notice—Inference—Municipal Corporation.

Appeal by plaintiff from judgment of MABEE, J., ante 101, dismissing action for damages for personal injuries sustained by plaintiff owing to an alleged defect, or want of repair, in a highway.

The appeal was heard by MULOCK, C.J., ANGLIN, J., CLUTE, J.

H. M. Mowat, K.C., for plaintiff.

W. E. Middleton, for defendants.

MULOCK, C.J.:—This is an action to recover damages from the corporation of the city of Ottawa, because of an accident sustained by the plaintiff, Mrs. Hobin, under the following circumstances.

On 17th November, 1905, plaintiff was standing on the sidewalk on the north-west corner of Bank street and Gladstone avenue, in the city of Ottawa, waiting to take a street

car. Two children came running down the street with a hand-sleigh, and plaintiff stepped out of their way backward upon what formed part of the sidewalk, being a round iron cover in the centre of an iron frame or grating over a man-hole, which extended down to the sewer. The cover tipped, causing her right leg to go down into the man-hole, when she fell on her side, fracturing two ribs and badly spraining her right knee. This frame is about two feet square and is imbedded in the concrete sidewalk at the outside edge. The cover weighs 40 or 50 pounds, and rests on an iron flange in the frame. No device of any kind was adopted in order to keep the cover in place, its weight and position in the groove of the frame alone being depended upon for that purpose. Directly underneath the cover is the man-hole down which the surface drainage from the street finds its way into the drain. At the lower end of the man-hole is a catch-basin to catch street washings, and the purpose of the defendants in not securing the cover in place by lock, bolt, or other device, was apparently to allow of its easier removal by their servants when desiring to clean out the man-hole. At the time of the accident the flange on which the cover rested, so far as appears, was quite sufficient to support it and to prevent it from tipping, if in place. The accident, therefore, could not have happened if the cover at the time had been in proper position. Its being out of position left the sidewalk in a state of non-repair, and plaintiff seeks to hold defendants responsible for negligence because of such non-repair.

The case was tried before Mabee, J., without a jury, on 11th June, 1906, and he reached the conclusion that the accident was not attributable to negligence on the part of defendants, and dismissed the action, but assessed damages at \$500, in case plaintiff should be held entitled to succeed. From this judgment plaintiff appeals.

It being clear that at the time of the accident the cover was not resting in proper position on the flange in the groove of the frame, the question arises, What is the probable explanation of its misplacement? The only evidence of its last removal prior to the accident was furnished by ward foreman Marks, a witness for defendants. According to his evidence, the operation of cleaning the catch-basins by his men was of frequent occurrence. No record was kept as to the dates of cleaning any particular basin, nor as to the

condition in which the work was left, and it would be surprising if, many months after such a transaction, the foreman could from actual recollection testify to the details. On his examination he expressed himself as sure the cover was properly replaced. I understand his evidence to be to the effect that, having regard to his general practice in requiring all such operations to be carried out with proper care, the one in question was so carried out. He was examined on 11th June, 1906, nearly 7 months after the accident, and his evidence shews that he was then speaking not from actual recollection, but from belief. Doubtless he spoke with perfect truthfulness, and, though he may have been mistaken, his credibility is not in question. I infer from his evidence that he has a number of labouring men under him, that they are constantly changing, that they go from man-hole to man-hole throughout the ward, cleaning them out and replacing the covers; that at times he is with them throughout the operation, at other times they precede him, he following them up to see that the work is properly done.

At the trial, as already mentioned, he was quite certain that this particular cover was properly replaced. He could not remember the names of any of the men engaged in the work when the cover in question was last removed, nor the precise day. The following are extracts from his cross-examination:—

“Q. Now, with reference to 17th November last, can you tell me when before that date you cleaned out the basin; what was the last occasion prior to that date you cleaned it out? A. Two weeks, I think it was, I cannot tell exactly the date. But two weeks about.

“Q. Two weeks before that? A. Two weeks before that.

“Q. And how do you get the top of it off to clean it out? A. We have to put a pick in and lift it out with a pick.

“Q. And after you have cleaned it out, what do you do with the top again? Q. Put that back in the same place.

“Q. Now, after you had cleaned it out on the occasion last before 17th November last, when you cleaned it out did you put the cover back in its place? A. Surely, yes.”

"Q. Before 17th November, how long had you cleaned it out yourself? A. I cannot state it exactly, but they clean it after every storm.

"Q. And if there is no storm, how often do you clean it? A. Once a month any way; every month. . . .

"Q. And you say you dig it out with a pick? A. With a pick. We cannot get it up any other way.

"Q. It cannot be got up any other way? A. It is too heavy. . . .

"Q. Unless it is picked up, anybody could interfere with it? A. No sir.

"Q. Then when was it last picked up? A. Four days, I think, before this accident happened.

"Q. How long before 17th November last had it been picked up? A. No, that was three weeks before.

"Q. Three weeks before? A. Two weeks before."

Evidently he had no clear idea as to the date, which may have been less than 4 days before the accident.

There is nothing to shew any interference with the cover after its last removal by defendants' servants, and before the happening of the accident, and, in the absence of evidence to the contrary, the inference would be that the accident happening, the men left the cover in an insecure position, a condition which, according to the evidence of the plaintiff, Miss Nichol, and Mr. Gibson, might easily escape detection.

At the trial plaintiff testified that she saw the cover of the man-hole just prior to the accident and observed nothing wrong with it. Marie Nichol, an eye witness of the accident, also testified to the like effect. Wyman Gibson also swore that just prior to the accident he crossed the frame, and it (doubtless meaning the cover) felt loose under his feet, and that it was level with the sidewalk. The following are extracts from his evidence:—

"A. As I stepped it wobbled, and I had stepped on it before, walking back and forth, waiting for the car, and it seemed it was not in a proper condition at the time for to be on a public thoroughfare, where people is waiting and stopping for a car every moment of the day.

"Q. When stepping on it, would it appear all right? A. It did appear all right."

From this evidence it is clear that the cover was out of place just before the accident, though that fact was not apparent to the ordinary passer-by.

Newton Kerr, the defendants' engineer, was called as a witness for the plaintiff, and the following are extracts from his evidence:—

“Q. How do you account for one side going down when a person steps on it? A. That would only happen in case the top had been shaken loose or disturbed in some way, an ordinary passenger would not shove one side down . . . Unless it was knocked out or displaced, I do not know.

“Q. How do you account for that? A. A very heavy rig passing the corner might hit the frame so as to jar it loose, a lorry or dray.

“Q. How would that shove it out? A. Shake it loose. . . .

“Q. Then it must be in a groove? A. It does.

“Q. How deep is that groove from the top? A. About a quarter of an inch.

“Q. So it would have to be a pretty heavy jar to crowd one side up a quarter of an inch? A. Yes, a very severe jar. . . .

“Q. Now it could be fastened down? A. Yes.

“Q. It could be fastened down so that only your employees who have to deal with it could get it up—is that not right? It could be locked down? A. It could be locked down.

“Q. With very little expense? A. Yes, a considerable delay and loss of time in unlocking it or unbolting it, whatever method you would have. We have never seen the necessity of locking them. . . .

“Q. It could be guarded against so it could only be gotten up, the top of it, only by your own employees, is that not right? A. Yes, it is so. . . .

“Q. Did you examine it before that? (that is the accident). A. I never took it out.”

He also stated that the removal of this cover to clean the catch-basin is being done constantly by “ordinary street

labourers who are being changed all the time, who are sent to clean out the basin, take off the lid, clean out the pit, and replace it." The engineer also stated that the frame with its cover in question had been in use, to his knowledge, for over 7 years, and it was of a kind in use in Toronto and elsewhere, and that he had not before heard of any such accident having happened.

For the defence ward foreman Marks stated that a pick was necessary in order to lift off the cover.

No question of credibility of witnesses arises, and it is our duty as an appellate Court to review the conclusion of the trial Judge, and to determine what is the proper inference to be drawn from all the evidence: *Russell v. LeFrancois*, 8 S. C. R. 336.

If the cover was properly replaced by defendants' servants, it could only have been removed by a stranger by the use of a pick, or a similar instrument, or some violent blow causing sufficient disturbance to displace it. There is no evidence shewing interference by a stranger, and I am unable to imagine any motive for a stranger meddling with it. If, therefore, defendants suggest such an improbable theory, it should be rejected in favour of the more probable one of defendants' negligence suggested by the evidence: *Czech v. General Steam Navigation Co.*, L. R. 3 C. P. 19. Nor do I think the suggestion that the cover may have been displaced by a heavy vehicle striking the frame advances defendants' position.

The outer edge of this metal frame extended to and formed part of the round corner of the sidewalk, where it was in a special degree exposed to the risk of being struck by passing vehicles, a danger much increased by the fact that the car tracks run around this corner doubtless frequently, causing vehicular traffic, which at this point was abnormally great, to pass along the narrow strip between the tracks, and the edge of the iron frame. These circumstances called for special care on the part of defendants. The engineer knew that the cover could be thrown out of place by vehicles striking the frame, yet defendants chose to depend upon its mere weight and position in the groove to prevent displacement.

It is argued that because the frame and cover in question are of a pattern in use in Toronto and elsewhere, and

no similar accident had occurred, the defendants had exercised all the care required of them, and had discharged their whole duty towards the public. It appears, however, to me, that if under ordinary circumstances this were an answer, yet, owing to the special position of the man-hole in question, defendants were bound to exercise more than ordinary care, and should not have depended upon a structure of ordinary pattern, which might have proved sufficient under ordinary circumstances, but insufficient under the circumstances present in this case. An extra safeguard such as a lock or bolt might, at no great cost, in the engineer's opinion, have been adopted; but defendants, for the greater convenience of their servants, omitted to adopt such reasonable device. If then the cover was displaced by a vehicle striking the frame, it is reasonable to assume that such result would not, in all probability, have followed, if a proper safeguard had been adopted, and for such omission defendants were, I consider, guilty of negligence. If, therefore, in seeking to ascertain the cause of the displacement of the cover, the improbable theory that it was the act of a stranger is disregarded, defendants are liable whether it was left out of position by their servants or displaced by a blow from a passing vehicle. Under the circumstances plaintiff is not bound to shew what particular negligence on the part of defendants caused the accident: *Byrne v. Boadle*, 2 H. & C. 728; *Scott v. London Dock Co.*, 3 H. & C. 601.

Returning then to the condition in which the cover was left when last removed by defendants, the proper inference, I think, is that for some reason it was not properly replaced by defendants' servants when they last removed it prior to the accident. Their omission to do so may have been caused by some wet street scourings, when being dipped out of the catch-basin, spilling and lodging on the flange supporting the cover, thus preventing it fitting flush with the street. According to the engineer's evidence, the cover had but a quarter of an inch hold on the groove. This would be lessened by the obstruction caused by any dirt lodging on the flange, and thus the cover would be more liable to be worked from its place by vibration caused by passing vehicles. Moreover, as may have happened from some reason, if one side of the cover were left actually

resting upon the frame instead of on the flange, it would be only a matter of time when the passing foot traffic on the sidewalk might work it so far out of place that the lower side would cease to rest upon the flange. But, whatever be the explanation, such was its position when it felt loose to Gibson, and tipped with plaintiff.

Defendants constructed the work, had control of it, and the sole right to interfere with it, were bound to keep it in reasonable repair, and to maintain a proper system of inspection, particularly in view of the fact that the cover was left in a condition making it possible for strangers or vehicular traffic to misplace it. They do not appear to have adopted any sufficient system of inspection for the discovery of a condition of non-repair. Their servants were the last persons who, so far as appears, interfered with the cover before the accident. It was in a state of non-repair, readily discoverable on a proper examination, and this state of non-repair caused the accident in question. The casual observation of foreman Marks in passing the place daily, which, of course, must include the day of the accident, and which did not disclose to him the then existing state of non-repair, shews that his was not a sufficient system of inspection.

The proper inference to draw from this state of facts is, in my opinion, that defendants' neglect caused the accident, and casts the onus upon them to disprove negligence: *Kearney v. London, Brighton, and South Coast R. W. Co.*, L. R. 5 Q. B. 441, L. R. 6 Q. B. 759; *Gee v. Metropolitan R. W. Co.*, L. R. 8 Q. B. 161.

This they have failed to do, and this appeal should be allowed with costs, and judgment entered for plaintiff for \$500 damages, the amount assessed by the trial Judge, and costs of this action.

ANGLIN, J., gave reasons in writing for the same conclusion.

CLUTE, J., also concurred.

NOVEMBER 13TH, 1906.

DIVISIONAL COURT.

RE FOLEY.

*Will — Construction — Annuities — Deficiency — Arrears
—Death of Annuitants—Application of Accumulated In-
come—Residuary Bequest to Charities.*

Appeal by the committee appointed by the county council of Peterborough to manage the funds applicable to charity under the will of Almira Grover Foley, deceased, from order of FALCONBRIDGE, C.J., ante 141, declaring that upon the true construction of the will it was the intention of the testatrix that the payment of annuities should commence immediately after her decease, but, as a matter of fact, the annuitants received nothing for about 3 years, and had not, except during the last year or two, received the whole amount of their annuities; that it was not the intention of the testatrix that the sum which represented the income or revenue which would have been paid to deceased annuitants should be applicable for charitable uses during the lifetime of any annuitant claiming under the will who has suffered any deficiency; and that the amount, therefore, of \$960 and any further sum which might accrue by reason of the death of annuitants should be placed to capital account, and the income thereof applied to supplement pro rata the past shortage in annuities until the last mortal annuitant should have departed this life or should have received the full amount of his or her arrears.

E. D. Armour, K.C., for appellants, contended that upon the death of any annuitant, the poor were to receive the benefit of the sum released under the following clause in the will: "Sixth, I will and direct that any part of my estate not definitely disposed of shall be held in trust as part of my residuary estate by my executors, for the benefit of the sober and industrious but destitute or needy widows and orphans of the county of Peterborough, who must have been bona fide residents of the said county before becoming destitute or needy."

E. H. D. Hall, Peterborough, for the annuitants.

J. B. Holden, for the executors and trustees

THE COURT (MULOCK, C.J., ANGLIN, J., CLUTE, J.), held that the failure to pay the annuities at the sums named in any year was only because the income of the estate was insufficient. The codicil made it quite clear that the amounts were not absolute but variable. The will fixing the amounts of the annuities, qualified by the codicil, did not entitle the annuitants to any definite sums, but merely indicated the proportions in which the income was to be distributed among the annuitants. No annuitant benefited by survivorship. On the death of an annuitant, the residuary legatees become entitled to the portion of the corpus which furnishes the deceased's annuity, but the corpus is not divisible at present, it must remain till all the mortal annuitants shall have died. It would be premature to do more now than declare what are the annuitants' rights.

Appeal allowed. Costs of all parties out of the estate.

NOVEMBER 13TH, 1906.

C.A.

THOMSON v. MARYLAND CASUALTY CO.

Accident Insurance—Action on Policy—Application for Policy—Untrue Statement by Insured—Findings of Jury—No Finding as to Materiality—New Trial—Costs.

Appeal by defendants from judgment of MABEE, J., upon the findings of a jury, in favour of plaintiff in an action upon a policy issued by defendants, known as an accident and health policy, in which plaintiff was named as the beneficiary.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

E. F. B. Johnston, K.C., and Eric N. Armour, for defendants.

W. Nesbitt, K.C., and J. Heighington, for plaintiff.

MOSS, C.J.O.:—In one branch of the policy, it insured plaintiff's husband, Robert McDowell Thomson, against bod-

ily injuries for one year from 11th March, 1905, and it was thereby agreed that if death should result from injury independent of all other causes, within 90 days from the happening of the accident, there would be paid to plaintiff the sum of \$5,000, and if the assured should meet with bodily injuries, and death should directly result therefrom while travelling as a passenger in or upon a public conveyance propelled (amongst other things) by electricity, there would be paid twice the said sum, or \$10,000.

The assured, while travelling upon and about to alight from a street car upon the system of the Toronto Railway Company, was thrown down and injured, and he died a few days afterwards.

The policy bears date 11th March, 1905, and was issued and delivered on 13th March. The accident occurred on 7th August, and the assured died on the 10th of the same month. Notice of the death was given to defendants on 11th August, and a request for forms of claim papers was made on 25th August. To this defendants replied on 8th September, stating that the assured held no policy in the defendant company which was in force, and that they were therefore under no liability by reason of his death, and thereafter this action was brought claiming payment of \$10,000.

The defendants made numerous defences, the chief of which were that the application upon which the policy issued contained misrepresentations material to the risk, that the premium was not paid, that before the assured received the injuries in respect of which the claim was made the policy had been cancelled, and that immediate notice of the accident was not given to defendants as required by the conditions of the policy.

Much evidence was adduced at the trial, and the trial Judge submitted a number of questions for answer by the jury, and upon the answers returned entered the judgment now appealed against, awarding plaintiff \$10,183.56 and costs.

At the conclusion of plaintiff's case defendants moved to dismiss the action, on the ground that there was no case to go to the jury, but the motion was properly dismissed.

On the argument of the appeal the same and many other objections to the judgment were urged. Without dealing with them in detail, it is sufficient to say that they should fail and the judgment should stand, but for the finding of the jury in one particular, and the unfortunate absence of a further finding consequent thereon, and which we think should have been dealt with by the jury.

Among the questions put to the jury was the following: "(3) Were any of the statements in the alleged proposal for insurance untrue, and if so which ones?" To which the jury answered: "The first part of number 9 untrue, and the second part true."

The statement number 9 in the proposal or application is in the following words: "No application ever made by me for insurance has been declined, and no accident or health policy issued to me has been cancelled except as herein stated; no exceptions."

The jury therefore found, and upon evidence which fully warrants the finding, that the statement that no application made by the assured for insurance had been declined was not true in fact. But, through some unfortunate oversight, although, as clearly appears from the charge, the trial Judge intended to take the opinion of the jury as to whether the statements contained in number 9 were material to the risk, the question actually submitted did not include No. 9. The question submitted was: "(6) Were any of the alleged statements from 15 to 19 material to the risk and if so which ones?" Answer: "Immaterial."

Thus, while defendants have a finding in their favour as to the want of truth, there is no finding either way as to the materiality of the statement. It is urged for plaintiff that the evidence shews and the jury have found that the answers in the proposal were not made by the assured, but were filled up by one Magee, an agent of the defendants, from his own knowledge, and that the assured did not make any representations or warranties on which the policy issued, that if any were untrue they were not made with the intention of misleading the defendants, and that they were not false to the knowledge of the assured. These findings are fully supported by the evidence, but they do not dispose of the point now in question.

The plaintiff is suing upon the policy, which is expressed to be issued in consideration of the warranties made in the application, a copy of which is indorsed and made a part thereof. That part of the policy cannot be ignored while it is put forward as a subsisting contract. And the question is not whether the statements were made by the assured or were filled up by some one else, or whether they were made in good faith and without knowledge of their want of truth, but whether the policy was obtained and a contract entered into upon the basis of the statements. If they form a basis of the contract of insurance, they bind plaintiff when suing to enforce the contract.

It was further urged that this being an accident and health policy, the words "application for insurance" in the first part of number 9 should be read as applying only to accident and health insurance, and not to life insurance, and that, inasmuch as the application that was refused was one for life insurance, there was nothing to support the finding. But the language is too general to be so narrowed, especially in view of the other part of the same statement, in which accident and health policies are specifically mentioned. The language, though general, would not, of course, be extended to cover insurances not of a personal nature, such as plate glass insurance, boiler insurance, or others of that class, for that would be to give to it an unreasonable effect. But in regard to insurance affecting a man's own person and involving inquiries as to his health and habits, there is nothing unreasonable. Apparently the jury thought it reasonable to apply it to life insurance. The trial Judge dealt with the question in his charge, and told them that if the statement did not include life insurance it would not be untrue, because the assured had never been refused anything but life insurance.

There was nothing, therefore, to have relieved the jury from finding one way or the other on the question of materiality, though it may well be that, in view of the considerations above dealt with, they would have found little difficulty in coming to a conclusion in plaintiff's favour. But, there being unfortunately no finding on the question, there must be a new trial.

The costs of the last trial and of the appeal should be costs in the action generally. The case was very fully and

fairly tried in other respects, and neither party can be said to be more responsible than the other for the omission which has rendered the new trial necessary.

GARROW and MACLAREN, JJ.A., concurred.

MEREDITH, J.A., agreed in the result, for reasons stated in writing.

NOVEMBER 13TH, 1906.

C.A.

ROBINSON v. MCGILLIVRAY.

Bankruptcy and Insolvency—Preferential Transfer of Cheque—Deposit with Private Banker—Application by Banker upon Overdue Note—Absence of Pre-arrangement and of Intent to Prefer—Payment of Money to a Creditor—Assignments Act, secs. 2, 3 (1).

Appeal by plaintiffs against the judgment of a Divisional Court (12 O. L. R. 91, 7 O. W. R. 438), affirming the judgment at the trial of FALCONBRIDGE, C.J., who dismissed the action with costs.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, JJ.A., TEETZEL, J.

G. C. Gibbons, K.C., and G. S. Gibbons, London, for plaintiffs.

T. G. Meredith, K.C., and F. R. Blewett, Listowel, for defendants Scott & Son.

GARROW, J.A.—The action was brought by plaintiffs, creditors of defendant McGillivray, to have set aside as preferential and void the transfer by defendant McGillivray to defendants Scott & Son of a certain cheque, in the following circumstances.

Defendant McGillivray was a merchant carrying on business at the town of Listowel. His business was evidently a failing one, and he was probably insolvent at the time of

the transaction in question, although perhaps not fully aware of it, because of the excessive values which he placed on his real property. In September, 1905, he agreed to sell out his business and stock in trade to one J. R. Grant for . . . \$1,172.27. Defendants Scott & Son carried on in the same town the business of private bankers, and both the buyer and seller had their bank accounts with the banking firm. And Mr. Grant in payment of the purchase money gave to defendant McGillivray his cheque upon Scott & Son's bank for the price agreed upon. Defendant McGillivray at once deposited this cheque in the same bank, apparently in the usual and ordinary course of business, and the amount was placed to his credit and charged to Mr. Grant in their respective accounts.

When the deposit was made, defendant McGillivray was indebted to defendants Scott & Son upon an overdue promissory note, amounting with interest to \$1,040, which had been charged up to defendant McGillivray's account a few days before the sale to Grant, but without the knowledge of defendant McGillivray—a circumstance which, although I mention it, I regard as of absolutely no importance.

Then a day or two after the deposit, or possibly on the same day, for the evidence is not entirely clear, but at all events after, and within two days after, the deposit, defendant McGillivray gave to defendants Scott & Son his own cheque on the Scott bank for \$1,040 in payment of the note.

And the action is brought really to set aside such payment as preferential.

Section 3, sub-sec. 1, of R. S. O. 1897 ch. 147, expressly excepts "any payment of money to a creditor" from the restrictive provisions of sec. 2. And I can see no reason why the present inquiry should not be limited to a consideration simply of whether what took place was or was not a "payment of money" within sec. 3.

Nor do I see any reason for looking at less than the whole transaction, as we were urged to do by the learned senior counsel for plaintiffs, who earnestly desired to draw a line between the deposit, which he contended was in itself a fraudulent preference, and the subsequent giving of his own cheque by defendant McGillivray, which he evidently considered to be much less valuable.

So regarding the case, the question is, in my opinion, completely covered by authority binding upon this Court against plaintiffs' contention: see *Gordon Mackay Co. v. Union Bank*, 26 A. R. 155. No question of set-off or banker's lien, in my opinion, is involved. No such right was asserted by defendants Scott & Son. They did not refuse, it may be because they were not asked, to allow defendant McGillivray to withdraw in cash, in whole or in part, the proceeds of the Grant cheque. Such questions might and probably would have arisen but for the giving of his own cheque by defendant McGillivray. But the giving of that cheque closed the transaction, and, in my opinion, absolutely put an end to all such questions.

So viewing the case, the proposition is reduced to this, that an insolvent debtor may not give his own cheque for the amount of a lawful debt, a proposition not even contended for by counsel for plaintiffs, and not only opposed to the case just cited, but to the reasoning set forth in the judgment in . . . *Davidson v. Fraser*, 23 A. R. 439, 28 S. C. R. 272.

Appeal dismissed with costs.

OSLER, J.A., gave reasons in writing for the same result.

MOSS, C.J.O., MACLAREN, J.A., and TEETZEL, J., concurred.

NOVEMBER 13TH, 1906.

C.A.

HULL v. ALLEN.

Account—Redemption—Trustee in Possession—Profits—Master's Report—Appeal.

Appeal by defendant from order of a Divisional Court, 6 O. W. R. 961, affirming the decision of MEREDITH, J., upon an appeal from the report of the Master at Woodstock, in respect of one item out of a number which formed the subject of appeal in the first instance.

W. E. Middleton, for defendant.

W. Nesbitt, K.C., and A. M. Stewart, for plaintiff.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, JJ.A., TEETZEL, J.), was delivered by

MOSS, C.J.O.:—The judgment pronounced at the trial declared that defendant was a trustee for plaintiff of (amongst other properties) a certain farm and brickyard, . . . and directed the Master to ascertain and state, having regard to the declaration aforesaid, what property came to the hands of defendant as trustee for plaintiff and the application thereof . . . and also to take an account of all moneys properly paid by defendant in respect of said property or for or on account of plaintiff, and what, if anything, was done and owing to plaintiff.

In taking these accounts the Master has found and reported that for 1902 there was a clear net profit in cash received by defendant from the operation of the farm and brickyard of \$1,500.

Defendant alleges that the Master did not arrive at this finding as the result of taking the accounts as brought in by defendant, but adopted a statement made by defendant while under examination in the Master's office. This does not appear on the report, nor does the Master state that such was the case.

In his testimony defendant, in speaking of the brickyard, stated that he never balanced his books from year to year. He then proceeded: "I know I am not running it at a loss. I think the profits in 1902 would amount to \$1,500; this is an estimate; I think this would be clear over and above all improvements; I mean \$1,500 in cash after all payments made except my own time."

When defendant was speaking he had with him and referred to the books kept in connection with the brickyard. And in the face of his positive statement on oath, "I know I am not running it at a loss," it is difficult to understand how he has been able to compile an account which would appear to shew an excess of expenditure over receipts of something like \$1,700 during 1902. And he has tendered no explanation under oath. There was much evidence given upon the whole accounts, and the Master had it all before him, including defendant's own testimony above quoted, when he was making his report. He has also reported that defendant did not keep proper books of account,

and did not keep the funds arising from the trust estate separate from his own funds; but used the said trust funds in carrying on his own business at Norwich, and on his examination for discovery defendant said he kept no account between himself and the brickyard. In these circumstances, the matter of the profits would lie largely within defendant's own knowledge. And before the Master he made the further statement quoted by the Divisional Court, "I cannot say if I got over \$1,500—I have not figured yet."

It comes to this, that the Master, with all the evidence before him, appears to have come to the conclusion that defendant's statement was correct, and that he should be charged with the sum at which he placed the profits for the year.

The Judge of first instance and the Divisional Court thought that the Master was not wrong in so doing, and we see no reason for not sustaining their conclusions.

Appeal dismissed with costs.

NOVEMBER 13TH, 1906.

C. A.

RE PORT ARTHUR AND RAINY RIVER PROVINCIAL ELECTION.

PRESTON v. KENNEDY.

Parliamentary Elections—Controverted Election—Scrutiny of Votes — Ruling of Trial Judge as to Disqualification of Class of Voters—No Jurisdiction in Court to Entertain Appeal—Provisions of Ontario Controverted Elections Act.

Appeal by petitioner from a ruling or decision of TEETZEL, J., one of the trial Judges, as to the evidence to be received upon a scrutiny of the votes cast at the election in question.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, J.J.A.

I. F. Hellmuth, K.C., and W. J. Elliott, for the petitioner.

H. M. Mowat, K.C., for the respondent.

OSLER, J.A.:—This case was recently before us on an appeal from the decision of the trial Judges dismissing the petition, on the grounds that the charges of corrupt practices had not been made out, and that the attack upon the respondent's majority on a scrutiny of the votes had also failed. We affirmed the decision on the first point and overruled it on the second. The case was again taken up before Teetzel, J., one of the trial Judges, and the scrutiny was proceeded with so far as to place the respondent in a majority of 15. The petitioner then proposed to attack a number of the respondent's votes as being invalid on the ground of the alienage or non-age of the voters, and, without passing upon the case of any individual vote, the learned Judge was asked to rule or to express his opinion whether as against the votes of persons whose names were on the list of voters as finally revised these grounds of objection were open to the petitioner. The learned Judge held that they were, and that the voters' list in this respect was not final and conclusive of the right of such persons to vote. The case therefore remained to be disposed of so far as such votes were concerned by the application of that ruling to the particular votes, few or many, which might be impeached on the grounds mentioned.

The first question is whether an appeal from a ruling or decision of this kind made during the course of the trial, which does not dispose of the petition, is competent.

Whether the decision be regarded as an adjudication, which it is not, upon the case of particular votes, or as a mere abstract ruling or opinion, which is its real character, by which the learned trial Judge proposes to guide himself hereafter when the evidence has been adduced, an appeal therefrom, so far as my experience goes, is an entirely novel proceeding and an experiment for which, with submission, nothing in the Election Act or rules affords countenance.

It can hardly be necessary to cite authority for the proposition that the right of appeal is matter of jurisdiction not of procedure or practice, and that an appeal does not lie unless expressly given by statute. *Attorney-General v. Sillem*, 10 H. L. Cas. 704, 2 H. & C. 431, *Rex v. Hanson*, 4 B. & Ald. 519, 521, and *Lennox Provincial Election*, 1 Ont. Elec. Cas. 422, may be referred to. The only appeals given by the Act (I do not speak of appeals from the decision of

a Judge in Chambers in interlocutory questions and matters—Rules LVII.-LX.), are appeals from the judgments of the trial Judge or Judges, disposing or not agreeing in the disposal of the matter of the petition. Provision is also made for submission to the full Court of a special case when it appears that the case raised by the petition can be conveniently stated in that way.

It is necessary briefly to outline the various relative sections of the Act.

Section 38. Every petition shall, except where it contains allegations of corrupt practices, in which case it must be tried by two Judges, and except where it raises a question of law for the determination of the Court (sec. 65), be tried by one of the Judges on the rota sitting in open Court without a jury.

Section 55. The Judge or Judges trying the petition shall determine whether the member whose election is complained of or any other person was duly returned or elected or whether the election was void, and shall certify in writing such determination to the Speaker or to the Clerk of the House, and upon such certificate being given such determination shall be final to all intents and purposes, subject only to the appeal hereinafter mentioned.

Section 56. In case of a disagreement between the trial Judges they shall certify such disagreement, and either party may bring the matter before the Court of Appeal, which Court shall in disposing thereof have the same jurisdiction in all respects as on an appeal from a decision of such Judges, and may determine all questions of law or fact which the disagreeing Judges might or should have determined, and in the same manner as in the opinion of the Court the disagreeing Judges should have done.

In such case the Registrar of the Court of Appeal is to certify to the Speaker or Clerk of the House the decision of the Court upon the case "in the same manner and to the same effect as according to the judgment of the Court of Appeal the trial Judges should have done."

Sub-section (2) enables the Court of Appeal to refer the case back to the trial Judges to certify to the Speaker or Clerk in accordance with their directions.

Section 58 directs how the appeal in case of disagreement shall be brought; what security for costs shall be given, and

when; "and the proceedings in the matter shall be the same as nearly as may be as in the case of an appeal from a decision of the Judges."

Section 63. If the trial Judges decide that the election or return was void, the member returned shall not sit or vote pending an appeal from the decision.

Section 64. A writ for a new election shall not be issued until after the expiration of 8 days from the decision of the trial Judge or Judges declaring the election or return void, and if the appeal is from the part of the decision which declares the election or return void, the writ shall not issue pending the appeal.

Section 66 and following section then provides for the appeal from the decision of the Judges referred to in sec. 55.

Section 66. Any party to an election petition who is dissatisfied with the decision of the trial Judges on any question of law or fact, and desires to appeal against the same, may within 8 days give the prescribed security for costs, and thereupon the Registrar is to set the matter of the petition down for hearing before the Court.

Section 67. Notice is to be given in the manner prescribed that the matter of the petition has been so set down, and by the notice the appellant may limit the subject of the appeal to any special or defined question or questions.

Section 68. The appeal shall thereupon be heard and disposed of by the Court, and judgment shall be pronounced both on questions of law and fact as in the opinion of the Court it should have been delivered by the Judge or Judges whose decision is appealed against.

Section 69. In cases involving questions of fact, the Court shall review the decision upon questions of fact as well as of law, and shall draw such inferences from the facts in evidence as the Judge or Judges who tried the case should have drawn.

Section 70 confers power upon the Court to make amendments and admit further evidence on the hearing of the appeal.

Section 87. The Court, with or without a report from the trial Judges as to the demeanour of witnesses, etc., may

reverse or confirm the decision appealed against, in view of the whole case as it then appears, or they may require any witnesses to be re-examined, etc.

Section 73. The Registrar of the Court shall thereupon certify to the Speaker or Clerk of the House the judgment and decisions of the Court upon the several questions and matters of fact, as well as of law upon which the Judge or Judges whose decision is appealed against might otherwise have determined or certified, and the judgment or decision shall be final to all intents and purposes.

Section 74. Instead of certifying as aforesaid, the Court, upon such conditions as it thinks fit, may grant a new trial for the purpose of taking evidence or additional evidence, and may remit the case to the Judge or Judges who tried the same, etc., and subject to the directions of the Court of Appeal, the case shall be thereafter proceeded with as if there had been no appeal.

Under the scrutiny clauses, as they formerly stood, the scrutiny was conducted before the registrar of the trial Judges or a barrister appointed by them, whose decision was reviewable before the Judges at the trial. As the Act is amended, the scrutiny takes place before the Judge or Judges themselves as part of the trial.

From the provisions I have quoted I think it clearly appears that the only appeal given by the Act is, as I have said, an appeal from the decision of the trial Judge or Judges which disposes of the whole matter of the petition as mentioned in sec. 55, or from a disagreement of the Judges at the trial upon questions which, if they had agreed in deciding them, would have done so, and which decision would have enabled them, in the absence of an appeal, to have certified to the Speaker or Clerk of the House the result of the trial. If there is an appeal, this became the duty of the Court of Appeal. If they do not direct a new trial or send the case back to the trial Judges (where they have disagreed) to dispose of the case in accordance with their directions, it is their judgment which becomes the final judgment and which is certified to the Speaker or Clerk instead of that of the trial Judges.

In short, the only judgment which the trial Judges are required to certify to the Speaker or Clerk is a judgment which disposes of the whole case, and the only appeal given

by the Act is one from such a judgment or from a disagreement of the trial Judges in respect of matters which if they had agreed would have done so.

I have not overlooked the provisions of sec. 2 sub-sec. (1), of the Controverted Elections Act, which enacts that the Court, which means the Court of Appeal, shall, subject to the provisions of the Act, have the same power, jurisdiction, and authority with reference to an election petition and the proceedings therein as the High Court of Justice would have if such petition were an ordinary action within the jurisdiction of that Court; and see Controverted Election Rule LXIV.

Whether the Court of Appeal or a Judge thereof could have made an order by applying *ad hoc* the provisions of Con. Rule 373, and directing a special case to be heard before Teetzel, J., or before the Court, raising the question of law which he has decided, is, I think, more than doubtful, seeing that the Controverted Elections Act, in sec. 65, has itself dealt with that method of procedure.

However that may be, it is not the way in which the case came before us. It is an appeal from a ruling of the trial Judge on a single question of law which has been raised before him, the determination of which, as applied to the facts which may afterwards be proved, may have no effect upon the ultimate decision of the case. I do not see how, by any analogy to the conduct of the trial of an ordinary action at law, such a ruling can be appealable. If it is so, and in the line of the procedure which has here been adopted, there may be as many separate appeals as there are different classes of votes to be scrutinized. The inconvenience, delay, and expense which would arise from such a practice need hardly be emphasized, and the fact that it may happen to be quite otherwise in this particular instance will not justify us in sanctioning it. Rules 531, 259, and Pooley v. Driver, 5 Ch. D. 458, 468, may be referred to.

MOSS, C.J.O., gave reasons in writing for the same conclusion.

GARROW and MACLAREN, J.J.A., concurred.

MEREDITH, J.A., dissented and was in favour of entertaining and allowing the appeal, for reasons given in writing.

Appeal dismissed with costs; MEREDITH, J.A., dissenting.

NOVEMBER 13TH, 1906.

C.A.

TAYLOR v. OTTAWA ELECTRIC CO.

Street Railways—Injury to Person Crossing Track—Negligence—Excessive Speed—Contributory Negligence—Findings of Jury—Evidence to Support.

Appeal by defendants from order of a Divisional Court (18th May, 1906), affirming a judgment entered by TEETZEL, J., at the trial, upon answers of the jury to questions submitted, in an action to recover damages for injuries to plaintiff, his horses and vehicle, through coming into collision with one of defendants' motor street cars in the city of Ottawa.

Upon the answers of the jury to the questions the Judge entered judgment for plaintiff for \$1,000 damages and costs; and upon appeal to a Divisional Court the judgment was affirmed.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

F. H. Chrysler, K.C., for defendants.

A. E. Fripp, Ottawa, for plaintiff.

MOSS, C.J.O.:—The case had been tried once before and resulted in judgment for plaintiff for the same amount of damages. Upon appeal to this Court a new trial was ordered upon the ground that the findings of the jury were not satisfactory nor so supported by the evidence as to make it proper that they should stand: see 5 O. W. R. 564.

At the former trial the negligence found by the jury was in not properly controlling the car, and we thought that, in

the absence of any finding of excessive speed, and in view of some of the evidence with reference to the position of plaintiff enabling him to see and avoid a car not driven at an excessive rate of speed, the case should be submitted to another jury.

The jury have now found, in answer to questions, that defendants were guilty of negligence, and that such negligence consisted in excessive rate of speed, running over 10 miles an hour; and that plaintiff's injury was caused by such negligence. They have also found that plaintiff could not by the exercise of reasonable care have avoided the injury.

Upon the argument before us it was conceded that the finding of the jury upon the question of speed could not be successfully questioned. But it was argued that the findings that plaintiff's injury was due to defendants' negligence, and that there was absence of contributory negligence, were against the weight of evidence.

It is to be noted that neither at the close of plaintiff's case in chief, nor when all the evidence on both sides had been adduced, did the able and experienced counsel who represented defendants at the trial ask the trial Judge to withdraw the case from the jury, on the ground that there was no evidence to go to them in support of plaintiff's contention that his injuries were due to defendants' negligence, or upon the ground that it manifestly and incontrovertibly appeared that plaintiff had by his own conduct caused his injuries, or had by his negligence contributed to the accident.

It was taken for granted, and properly so, by all engaged in the trial, that the case could not be withdrawn from the jury. It is not a case which affords ground for contending that there was no evidence to support plaintiff's case; and on the argument the main ground taken was that the findings complained of were against evidence and the weight of evidence.

The questions at issue were therefore matters for the jury to determine; and, looking at the whole case, though one might feel that it would have been more satisfactory if the jury had adopted the contrary view, still it cannot be said that their findings are such as a jury, viewing the whole of the evidence, could not make.

The findings of the jury on the present occasion that the car was going at an excessive rate of speed puts an entirely different complexion on the case to that which it exhibited when before us on the former occasion.

The appeal should be dismissed with costs.

GARROW and MACLAREN, JJ.A., concurred.

OSLER, J.A.:—I agree in the result, but with considerable doubt.

The case for plaintiff is a most unsatisfactory one, and it is very difficult to look at the findings of the jury with respect, especially those which acquit plaintiff of neglect and attribute the accident to the neglect of the company. I am not, however, able to say that there was not some evidence in favour of these findings, especially as to the car having been going at an excessive rate of speed; and the fact that this was the second trial of the case, and the result the same as the first, influences me to some extent in declining to interfere.

MEREDITH, J.A., dissented, and was in favour of ordering a new trial, for reasons given in writing.

NOVEMBER 13TH, 1906.

C.A.

PLAYFAIR v. TURNER LUMBER CO.

Contract—Construction—Breach—Supply of Logs—Condition—Driving and Towing—Season for Towing.

Appeal by defendants from judgment of BOYD, C., at the trial at Toronto, declaring plaintiff entitled to recover from defendants damages by reason of the breach of their contract to supply logs to plaintiff, holding that defendants were responsible for the failure to furnish logs, and directing a reference to ascertain the amount of the damages.

R. McKay, for appellants, contended that upon the true construction of the agreement the appellants were not liable to furnish logs to plaintiff for sawing, it being distinctly made a condition of the agreement that all the logs mentioned therein should be safely driven to the mouth of the Spanish river and safely towed to Midland, Ontario.

F. E. Hodgins, K.C., and F. W. Grant, Midland, for plaintiff.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.), was delivered by

MEREDITH, J.A.:—Two answers are made by defendants to plaintiff's claim for damages for breach of the contract in question: (1) that not having brought down all of the logs marked I.O.E. and C.A.T., they were not bound to supply plaintiff with any; and (2) that they are excused by reason of being unable to get the logs down "during the towing season."

But the contract does not, in my opinion, warrant the contention that the defendants were not to be bound to supply any logs unless they got all down. The words "all the logs hereinbefore mentioned" do not necessarily refer to all of the logs marked I.O.E. and C.A.T. Those logs are thereinbefore mentioned as the blocks of logs out of either of which plaintiff's mill was to be supplied only. Plaintiff was not at all concerned in them beyond the quantity necessary to fill this contract. On the contrary, the words "all of the logs hereinbefore mentioned," in my opinion, refer to all of the logs with which the defendants were to supply plaintiff. Such logs are thereinbefore mentioned as "all of the pine logs . . .", and were the subject matter of the contract, and the object to which the mind's eye would be directed chiefly. And the words in question are followed by the words "are safely towed to Midland," and the contract is to furnish plaintiff with the logs at Midland; and then follows the defendants' undertaking to drive "the said logs" and tow them to Midland. It is surely, throughout, the same logs which are meant; those which the parties were contracting about, and which were to be taken to Midland by defendants to enable them to perform the contract on their part.

Why should these words have reference to logs in which plaintiff was in no way concerned, and which defendants could deal with and dispose of as they saw fit? And how could the contract be carried out if defendants' contention in this respect were acceded to? It would not, or might not, be known, until the season was over, whether all the logs could be got down to Midland, and in the meantime the mill was to be kept supplied, and was in fact, until about the 27th August. One can hardly suppose a mill owner entering, or being asked to enter, into such a contract as that, tying up his mill and mill yard for months without anything binding on the other side.

The whole purpose of the "condition" in question seems to me to have been, not to put such a one-sided power in defendants' hands, but rather to guard defendants against liability in regard to the logs, which they were to deliver to plaintiff, if lost in transit—not "safely driven" or "safely towed," being, as one would expect, immediately followed by an agreement on their part to "safely drive" and "safely tow" them.

But, if this were not so, would not defendants be liable to plaintiff under their contract to safely drive and safely tow "all the logs," whichever meaning is attributed to those words? They were not prevented by "unavoidable accidents, stress of weather, or events beyond their control." They had the sawing done at another mill under a contract made on 6th September.

But they were bound to so drive and tow only during "the towing season of the year 1905;" so are they excused under their second defence?

The finding of the trial Judge was against them on this question of fact. Some evidence was given on both sides with reference to it; but it does not seem to me that even a serious attempt was made to prove that there is a definite towing season ending on 1st September. Proof that any particular person or company did or did not tow logs after that date is very far removed from proof of such a season. The words of the contract make against the defence, referring as they do to the towing season "of the year 1905," conveying, in some measure at all events, the impression that the length of the season of that year might differ from that of another year.

At all events defendants have quite failed to establish in fact this defence.

I would dismiss the appeal.

OCTOBER 31ST, 1906.

DIVISIONAL COURT.

PETTYPIECE v. TURLEY.

Will — Construction—Absolute Devise Followed by Trust or Power of Appointment in Favour of Relatives—Conveyance to One Member of Class Designated—Operation of—Execution of Power.

Appeal by plaintiff from judgment of FALCONBRIDGE, C.J., of 15th May, 1906, dismissing the action with costs.

The land in question was a farm owned by Thomas Pettypiece, the father of plaintiff and defendant.

By will made on 18th July, 1882, Thomas Pettypiece devised the farm to his wife for life, with remainder in fee to his son Frederick Pettypiece, the estate so devised to his son being subject to the payment of two legacies to his two sisters.

Frederick Pettypiece subsequently died, having made his will on 18th July, 1885, by which he devised his interest in the farm to his mother, the tenant for life, "to her, her heirs and assigns, absolutely and forever. . . . to be disposed of by her as she may deem most fit and proper for the best interest of my brothers and sisters, and enjoining my said mother to pay to my two sisters the legacies binding on me by the aforesaid mentioned will of my deceased father."

The mother, by a conveyance dated 24th October, 1899, conveyed the farm in fee simple to defendant, who was one of the sisters of Frederick Pettypiece. This conveyance was impressed to be made in consideration of \$1 and natural love and affection. It contained no reference to the will, nor did it upon its face indicate any intention to execute the power or trust created by the will of Frederick Pettypiece.

This action was brought for a declaration that the land passed to the mother upon an express trust, entitling plaintiff (brother of Frederick) and his sister, the defendant, to have the land divided between them, and that the conveyance to defendant was inoperative, etc.

F. E. Hodgins, K.C., for plaintiff.

H. E. Rose, for defendant.

THE COURT (MEREDITH, C.J., MACMAHON, J., ANGLIN, J.), held that, assuming in favour of plaintiff that a trust was created, the conveyance by the mother to defendant operated and was intended to operate as an execution of the trust, referring to Farwell on Powers, 22nd ed., pp. 176, 266; that the power or trust was well executed in the manner in which the mother assumed to exercise it, referring to *Civil v. Rich*, 1 Ch. Cas. 309; *Burrell v. Burrell*, 1 Amb. 660; *Kemp v. Kemp*, 5 Ves. 849, 859; *McGibbon v. Abbott*, 10 App. Cas. 653; and *Crockett v. Crockett*, 2 Ph. 553.

Appeal dismissed with costs.

BRITTON, J.

NOVEMBER 14TH, 1906.

CHAMBERS.

BELL v. GOODISON THRESHER CO.

Venue — Contract as to — Motion to Change — Effect of Statute 6 Edw. VII. ch. 19, sec. 22 (O.)—Application of—Retroactivity—Costs—Preponderance of Convenience.

Appeal by defendants from order of Master in Chambers, ante 567, dismissing defendants' motion to change the venue from Barrie to Sarnia.

T. N. Phelan, for defendants.

W. A. Boys, Barrie, for plaintiffs.

BRITTON, J.:—This is an action brought by the purchasers of a threshing machine and equipment against the manufacturers. Plaintiffs' cause of action is upon an alleged agreement made on 23rd December, 1905. This was,

as alleged, a distinctly new agreement in reference to an engine which plaintiffs then had in their possession. Such an agreement, if made, would supersede, as to the engine and as to plaintiffs' rights in regard to it, an agreement of 28th February, 1905, made between the parties. According to the new agreement, as set out in the statement of claim, the engine was "to be put in running order, capable of developing 17 horse power under the working and other conditions provided for" in the agreement of 23rd December, 1905, and in all other respects the engine was to fulfil the terms and conditions of the prior agreement.

Plaintiffs, as shewing consideration for this new agreement, state the fact of making the prior agreement, and to ascertain all the terms of the new agreement it will be necessary to look at the former one.

The case is very like *Greer v. Sawyer-Massey Co.*, 6 O. W. R. 594.

The agreement of 28th May, 1905, contains the following clauses:—

(1). "And if any action or actions arise in respect to the said machine or notes or any renewals thereof, the same shall be entered, tried, and finally disposed of in the Court which has its sittings where the head office of the said company (defendants) is located."

This seems to refer to actions of the competency of a Division Court.

It can hardly be said that this action is in reference to a machine sold under this contract.

(2). "Any action brought with respect to this contract or in any way connected therewith, between the parties, shall be tried at the town of Sarnia, and the purchasers consent to have the venue in any such action changed to Sarnia, no matter where the same may be laid."

I do not think the present action is one within the true meaning of that stipulation.

If it can be said that these are terms which must be imported into the agreement of 23rd December, 1905, then they are within and covered by sub-sec. 2 of sec. 22 of 6 Edw. VII. ch. 19.

I think the appeal must be dismissed. Costs to be costs in the cause.

Plaintiffs to have leave to amend at the trial, if necessary, by striking out of the statement of claim anything making any claim under the agreement of 28th February, 1905.

MULOCK, C.J.

NOVEMBER 14TH, 1906.

TRIAL.

HARE v. KRICK.

Landlord and Tenant — Oral Agreement for Lease — Tenant in Possession — Disturbance of Possession — Trespass — Lease to Stranger — Notice — Registry Laws — Damages—Injunction.

Action for a declaration of plaintiff's rights in 50 acres of land, being the south-west quarter of lot 16 in the 1st concession of the township of Rainham, and for an injunction restraining defendants from interfering with plaintiff's enjoyment thereof, and for damages for trespass.

G. Lynch-Staunton, K.C., and J. A. Murphy, Cayuga, for plaintiff.

W. M. Douglas, K.C., for defendants Krick and Maines.

S. H. Bradford, for defendant Hoover.

MULOCK, C.J.:—The 50 acres are divided into 4 fields, which are shewn on the plan filed at the trial as fields lettered A, B, C, and D, respectively.

By agreement made in the autumn of 1905, between defendant Hoover, the owner of the 50 acres, and plaintiff, it was agreed that plaintiff should put part of field D in fall wheat on shares. This was done.

In the spring of 1906, by like arrangement, plaintiff put another part of field D in peas on shares. This left a substantial part of field D in stubble.

At an interview between plaintiff and Hoover, when the latter arrangement was made, plaintiff expressed a desire to rent the whole 50 acres for two years. Hoover explained that he was in treaty with one Brett for the lease to him of the whole 200 acres, and would require Brett's consent to a lease to plaintiff for a longer period than one year. The parties differ in their account of the interview. Hoover

says that, dependent on Brett's consent, plaintiff was willing to take 50 acres for one or two years from 1st October, 1906. Plaintiff says he desired a lease for two years certain from June, 1906, and was not prepared to accept a one year lease. On 20th May, Hoover, Brett, and plaintiff discussed the subject, when defendant Hoover reached the conclusion that Brett had assented to a one year term only, whilst plaintiff supposed he consented to a two year term, Brett at the trial swore that he consented to the one year term only. Plaintiff and defendant Hoover, however, omitted to interchange views as to their respective conclusions regarding the extent of Brett's consent, but assumed that they had reached an arrangement for a definite term. Hoover, thus thinking that plaintiff was accepting a term expiring on 1st October, 1907 (so far as rent was concerned to be considered a term for one year), authorized plaintiff (subject to Hoover's interest in the growing crops) to take possession and prepare the land for fall wheat, agreeing to allow him to haul a quantity of manure off Hoover's near-by farm, where he resided, to the 50 acres in question. Thereupon, about the middle of June, 1905, plaintiff took possession of the 50 acres in the belief that he was doing so under a concluded arrangement for a lease for two years, and he began to summer fallow field A and to cultivate other parts of the property, hauling upon it from Hoover's farm between 200 and 300 loads of manure. Throughout the summer, prior to the lease hereinafter mentioned to defendants Krick and Maines, plaintiff, with Hoover's knowledge and consent, ploughed, manured, and otherwise prepared field A, and in September sowed it in fall wheat. From the time of his taking possession in June, 1906, plaintiff remained continuously in undisturbed possession of field A, until about 5th October, when his landlord, Hoover, with defendants Krick and Maines, broke into field A, then in fall wheat, and proceeded to drill for gas.

At the trial plaintiff failed to prove a consent from Brett to a two year term. Under these circumstances the negotiations did not result in a mutual arrangement for a lease for two years. What then is the position of plaintiff? Defendant Hoover says he was to be entitled to hold until 1st October, 1907. About the middle of June, 1906, by mutual agreement, he took possession as tenant, it being then understood that plaintiff would at once proceed to

cultivate and prepare the land for fall wheat, and should be entitled in the following year to reap what he had sowed. This understanding entitled plaintiff to possession of the whole 50 acres so long as he was entitled to possession of any portion of it, for the understanding, under which he took possession, had reference not to a portion, but to the whole 50 acres. Hoover says the term was to expire on 1st October, 1907. Both parties agree that the rent was to be \$85 a year and taxes and performance by plaintiff of statute labour. As plaintiff was getting little or no benefit from the occupation of the farm during the summer of 1906, it was not contemplated that he should pay any rent for that period of the term. Under the circumstances above set forth, plaintiff is, as against Hoover and those claiming through him with notice, entitled to retain possession of the 50 acres until 1st October, 1907, paying as rent \$85 and taxes and performing statute labour for the year 1907.

Then as to trespass. It appears that immediately adjoining field A, now in fall wheat, is land owned by plaintiff and on which, close to the boundary line between the two properties, a gas well has been sunk and a flow of natural gas has been procured. In August, 1906, defendant Hoover made a lease to defendants Krick and Maines, as trustees for the Erie Gas Company (not then incorporated), of a part of field A for the purpose of enabling them to drill thereon for natural gas. On 5th October, 1906, Hoover and Krick and Maines went to field A and took forcible possession of a portion thereof. Hoover pulled down the fence and admitted the others with their plant into the field that they might there drill for gas. They then erected drilling machinery and proceeded to drill. Thereupon plaintiff instituted these proceedings and obtained an injunction.

I see no possible justification for Hoover's action. He put plaintiff as his tenant in possession; was aware of his expending labour upon the land throughout the summer with the view of sowing it in fall wheat in expectation of reaping the fruits of his labour; and he was in possession with Hoover's consent for an unexpired term, when the latter took forcible possession. In so acting, Hoover was committing a trespass for which I can see no possible excuse.

As to the action of Krick and Maines, they endeavoured to justify as lessees in good faith without notice of plain-

tiff's rights. But, even if, for want of notice, their lease were to prevail over that of plaintiff, that would not warrant forcible entry; but they were not purchasers without notice, for plaintiff was in actual possession under a verbal lease for a term beginning in June, 1906, which, being for a period less than 7 years, was not required by the Registry Act to be registered, possession itself being notice to these defendants. They, therefore, were trespassers, have no right to remain in possession, and should be ejected.

Plaintiff is entitled to have the injunction made perpetual, and to remain in possession as tenant of Hoover until 1st October, 1907, paying as rent \$85 a year and taxes, and performing statute labour. I award him \$25 damages for the trespass and the costs of the action.

TEETZEL, J.

NOVEMBER 15TH, 1906.

CHAMBERS.

RE TAYLOR v. REID.

Division Court — Territorial Jurisdiction — Contract—Statute of Frauds—Cause of Action —Where Arising — Sale of Goods — Acceptance — Place of Delivery—Prohibition.

Motion by defendant for prohibition to the 1st Division Court in the county of York.

Grayson Smith, for defendant.

A. R. Clute, for plaintiff.

TEETZEL, J.:—Plaintiff, a merchant tailor in Toronto, sued defendant, who lives in Belleville, for \$45, the price of a frock coat ordered (by word of mouth) by defendant in Toronto to be sent by express to him at Belleville. Defendant filed a notice disputing the jurisdiction, and also setting up the 17th section of the Statute of Frauds. . . .

The Statute of Frauds being applicable, the sole question is whether the whole cause of action arose in the territory of the 1st Division Court in the county of York. In order to satisfy the statute in this case, it is not sufficient to prove delivery to the express company, defendant's carriers, but plaintiff must also prove an acceptance of the goods by defendant, or at least some act by defendant in relation to the goods which recognizes a pre-existing con-

tract: Benjamin on Sale, 5th ed., pp. 200-212; Scott v. Melady, 27 A. R. 193. Whatever was done by defendant to constitute an acceptance within the statute was admittedly done in Belleville, and must be proved by plaintiff as an essential element in support of his right to the judgment of the Court, and is, therefore, a part of his cause of action. See *Re Doolittle v. Electrical Maintenance and Construction Co.*, 3 O. L. R. 460, 1 O. W. R. 202; *Bicknell & Seager's Division Courts Act*, 2nd ed., pp. 131-2.

Order made for prohibition with costs to be paid by plaintiff.

BRITTON, J.

NOVEMBER 15TH, 1906.

CHAMBERS.

APPLEYARD v. MULLIGAN.

Dismissal of Action—Motion to Dismiss for Failure of Plaintiff to Attend for Examination for Discovery—Illness of Plaintiff—Medical Evidence as to—Undertaking to Proceed to Trial—Excuse for Delay—Increased Security for Costs.

Appeal by defendants from order of Master in Chambers, ante 500.

J. E. Jones, for defendants.

J. Bicknell, K.C., for plaintiff.

BRITTON, J.:—I quite agree with the learned Master in thinking that the excuse of plaintiff, although not completely satisfactory in every respect, for her failure to attend for examination for discovery, must be accepted. Notwithstanding what has been said by the medical men, it is rather difficult for me to understand why this action should cause plaintiff any worry or why she should fear that there would be put upon her any nervous strain or excitement by an examination for discovery. I suppose she knows why she has brought suit, and what she claims from defendants, and whether she owes anything to defendants or not.

It is just as difficult to understand why defendants are so anxious to have plaintiff's examination for discovery. In my opinion, they know as much about this action now as they will know after such examination if it takes place.

Plaintiff must make out her own case at the trial if she can, and if defendants have a valid counterclaim, they will not rely upon plaintiff for proof of it. For these reasons, the suggestion of the Master that defendants enter the case for trial, give notice of trial, and proceed to trial, unless plaintiff succeeds for good cause in getting the trial postponed, seems to me appropriate.

Appeal dismissed. Costs of the appeal to be costs in cause to plaintiff.

FALCONBRIDGE, C.J.

NOVEMBER 15TH, 1906.

WEEKLY COURT.

RE SHARON AND STUART.

Will—Construction—Devise — Life Estate — Remainder — Estate Tail — Rule in Shelley's Case — Rule in Wild's Case — Ascertainment of Class—Period of Distribution —Intermediate Life Estate — Wife of First Tenant for Life—Second Marriage.

Case submitted to the Court under sec. 4 of the Vendors and Purchasers Act.

A. H. Clarke, K.C., for both vendor and purchaser.

FALCONBRIDGE, C.J.:—Gilbert Sharon, the vendor, father of the infants Frank Ernest Sharon and William A. Sharon, contends that he is entitled to an estate tail in the property in question under the will of his father, Pierre Sharon (or Charron) and able to bar the entail so as to make title.

By clause 2 of the will of Pierre Sharon, who died in December, 1860, the lands in question are devised to Gilbert, "to have and to hold to him, etc., as aforesaid, and not otherwise."

The latter words evidently refer to the words in which other lands are devised to other sons in the earlier part of the same clause. These words, so far as material, are: "To have and to hold to each of them for and during their natural life respectively, and if they should marry after their and such of their decease, to have and to hold to their surviving wife respectively, and on the demise of their or each of their wives, to have and to hold to their children

respectively, and their heirs forever." There is also a devise to the three sons of other lands, "to have and to hold to them as is aforesaid mentioned," etc.

One son only was married at the date of the will, and of the testator's death. That son had one child. Gilbert was then only 14 years of age.

The will, considering the use of technical words, seems to have been drawn by some one more or less acquainted with their meaning, but it is evident that their full import was not present to the draftsman's mind. I point to the use of "to have and to hold" in conferring the various interests.

I take it that the plain intention is, to devise the property to the son for life, and if he marry, then from and after his death to his widow for life, and from and after her death to his children and their heirs. Otherwise it does not seem possible to give effect to the words used. . . .

I think the rule in *Wild's Case*, 6 Rep. 17, is wholly inapplicable to the present case, and that if an estate tail in Gilbert were created, it could be solely under the rule in *Shelley's Case*.

The rule in *Wild's Case* is stated in *Jarman*, 5th ed., p. 1235, as follows: "Where lands are devised to a person and his children, and he has no child at the time of his devise, the parent takes an estate tail; for it is said, the intent of the devisor is manifest and certain that the children (or issues) should take, and as immediate devisees they cannot take, because they are not in *rerum natura*, and by way of remainder they cannot take, for that was not his (the devisor's) intent, for the gift is immediate; therefore, such words should be taken as words of limitation." See also *Underhill & Strahan on Interpretation of Wills and Settlements*, p. 163, and the statement of the rule by Lord Cranworth in *Byng v. Byng*, 10 H. L. C. 171, 178.

It would seem to be too clear for argument that this rule can apply only where the gift to both the parent and the children is immediate, for otherwise the reasoning entirely fails. I have not found a reported case in which the devise was not in effect to a man and his children, both interests coming into being at the same time. . . .

[Reference to *Grant v. Fuller*, 33 S. C. R. 34.]

The point then remains as to whether the rule in *Shelley's Case* applies. This is covered by the decision of the

Court of Appeal in *Chandler v. Gibson*, 2 O. L. R. 442, cited with approval in *Grant v. Fuller*, supra, which was a stronger case than the present one. . . . This is, in effect, the present case.

As to the devise to the children being a devise in fee, the question raised in *Chandler v. Gibson* does not arise, as the devise is to the "children and their heirs;" as to this see *Chandler v. Gibson*, 2 O. L. R. at p. 446.

There is another question, viz., Who are the children entitled to the devise in fee? This devise is a gift to a class, and, as the period of distribution is postponed until the death of the prior life tenants, the class will comprise all children coming into existence before the period of distribution: *Jarman*, p. 1011. Therefore, as the father may marry again, he may have children who will be entitled to share in the fee.

It is evident that title cannot be made without the order of the Court on behalf of the infant and unborn children of Gilbert Sharon.

The first question is, whether Gilbert Sharon took an estate tail, subject to the life estate of his wife, which he is able to dispose of for an estate in fee simple absolute.

The answer is, no.

The second question is, whether, in case of a second marriage by Gilbert Sharon, his second wife would be entitled to a life estate under the terms of the will.

The answer is, yes. Gilbert Sharon being unmarried at the date of the will, the testator must have referred to a future wife, and there is nothing to shew that he did not mean any future wife.

MACMAHON, J.

NOVEMBER 15TH, 1906.

TRIAL.

ACME OIL CO. v. CAMPBELL.

Specific Performance—Contract for Lease of Land—Statute of Frauds—No Time Fixed for Commencement or Duration of Term—Alteration of Contract after Execution—Materiality.

Action for specific performance of an agreement for a lease of oil lands by defendant Campbell to plaintiffs, and for other relief against that defendant and defendants the

Central Oil and Gas Co., to whom defendant Campbell had purported to make a subsequent lease.

M. Wilson, K.C., and A. T. Boles, Leamington, for plaintiffs.

W. H. Blake, K.C., for defendants.

MACMAHON, J.:—The defendant Campbell, who is the owner of the lands hereinafter referred to, signed the following agreement:—

“Memorandum of agreement made and entered into this 23rd day of September, 1905, by and between the Acme Oil Company and James Campbell.

“For valuable consideration I hereby agree to lease to the Acme Oil Company of Detroit, Michigan, at such time as said company shall remove a drilling rig into this immediate district preparatory to drilling for oil, &c., 49 acres of land more particularly described as follows: south parts of lots 5 and 6, concession 10 township of Tilbury East, county of Kent, Ontario, with the exclusive right of operating for oil, gas, or mineral.

“The terms of lease to be as follows:—Should oil be found in sufficient quantities to be utilized, the Acme Oil Company agrees to give one barrel in every ten barrels produced or obtained on said premises. Should gas be found in sufficient quantities to utilize, said company to allow me the privilege of using sufficient gas to heat and light one dwelling house.

“Should a well not be completed on my premises within one year from date, said company agrees to pay an annual rental of 25 cents per acre, in advance, for each year such completion is delayed.

“It is understood between the parties to this agreement that all conditions between the parties hereto shall extend to their heirs, executors, assigns, and administrators.

“In witness whereof the parties have hereunto set their hands and seals the day and year first above written.

“This agreement shall be null and void if a well is not started in the district within 60 days from date.”

After the signing of the agreement it was altered by the following being written in the margin thereof and as forming part of the agreement, by John Kerr, the witness thereto:

“This contract is given with understanding that the first well is put down on north half 10, or on lot mentioned in this contract.”

The agreement as altered was deposited by plaintiffs in the registry office for the county of Kent, pursuant to the Custody of Title Deeds Act, and was duly entered by the registrar in the proper abstract index.

On 24th March, 1906, Campbell leased the lands to defendants the Central Oil and Gas Company, for the purpose of drilling for oil and gas, and that company put down a well or wells on the same and produced oil which they sold and shipped.

Plaintiffs claim specific performance of the agreement entered into by defendant Campbell, and a declaration that plaintiff is entitled to the possession of the described lands, and an injunction restraining the defendants, or either of them, from drilling for or producing or carrying away petroleum oil from the premises, and an account of the oil produced.

A lease was prepared by plaintiffs, dated 1st November, 1905, and was about that date tendered to Campbell, who refused to execute it. The demise in the lease tendered for execution is "for the term of 5 years and so long thereafter as oil or gas is produced from the land in paying quantities," &c.

Specific performance is resisted on two grounds: (1) that according to the provisions of the Statute of Frauds there is no sufficient contract; (2) that after the agreement was signed by defendant Campbell, it was altered by plaintiffs, or some person, unknown to defendants, and is, therefore, void; and that plaintiffs have not tendered to defendant Campbell a lease in accordance with the terms of the agreement.

The agreement is lacking in two essential conditions, which disentitle plaintiffs to enforce specific performance; the time from which the term is to commence, and the duration of the term for which the lease is to be granted are not stated therein.

No mention is made in the agreement of the time from which the term is to commence, nor is there anything therein from which it can be inferred what day it is to commence from. It could not be contended that the commencement of the term should be from the date of the agreement, because of these words, "To lease to the Aeme Oil Company . . . at such time as said company shall move a drilling rig into this immediate vicinity." That might

never happen. And the commencement of the term, in order to satisfy the Statute of Frauds, must be certain.

In *Marshall v. Berridge*, 19 Ch. D. 223, Lush, L.J., said, at p. 244: "Now it is essential to the validity of a lease that it shall appear either in express terms or by reference to some writing which would make it certain, or by reasonable inference from the language used, on what day the term is to commence. There must be a certain beginning, and a certain ending, otherwise it is not a perfect lease, and a contract for a lease must, in order to satisfy the Statute of Frauds, contain those elements." . . .

[Reference to *Humphrey v. Conybeare*, 80 L. T. 40; *Carroll v. Williams*, 1 O. R. 150.]

Then as to the duration of the term for which the lease is to be granted not being stated in the agreement. As early as 1802, in *Clinan v. Cooke*, 1 Sch. & Lef. 23, where in an agreement, executed between the plaintiff and the agent of the defendant (authorized to contract), for a lease of certain lands, the term for which the lease was to be made was not mentioned, it was held by Lord Redesdale that the defendant was not bound to perform the contract, there being no evidence in the writing of the term to be demised. . . .

[Reference to *Fitzmaurice v. Bayley*, 9 H. L. C. 78, 109, 110; *Clark v. Fuller*, 16 C. B. N. S. 24.]

The essential elements to satisfy the Statute of Frauds are wanting in the agreement on which the action is founded, and it must be dismissed with costs.

As to the defence of the alteration of the agreement, Mr. Kerr says that Campbell was standing there and was verifying the condition under which the contract was given; that is the reason it (the memorandum in the margin) was put there; and presumed that Campbell knew what was being written, and from his silence was assenting to it.

Campbell said he neither saw nor knew of any addition being made to the document after he signed it, and, therefore, could not have assented to its being made.

I find that the addition was made after the agreement was signed by Campbell, and without his consent, and was made by Kerr.

Having for the reasons stated reached the conclusion that the agreement was void, I have not considered it necessary to consider whether the alteration made is a material one.

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RIDDELL, J.

NOVEMBER 16TH, 1906.

TRIAL.

ZILLIAX v. INDEPENDENT ORDER OF FORESTERS.

Benefit Society—Rights of Member—Action for Declaration of Rights—Domestic Tribunal—Failure to Resort to—Submission to Jurisdiction—Refusal of Court to Entertain Action—Costs.

Action for a declaration of the rights of plaintiff as a member of the defendant society.

C. R. McKeown, Orangeville, for plaintiff.

W. H. Hunter, for defendants.

RIDDELL, J.:—The plaintiff was a member of the Independent Order of Foresters, in the beneficiary or insurance branch. A dispute arising as to his right to continue to be such member, a body of officials of the Order decided against him. An appeal is provided for by the constitution, by which plaintiff is admittedly bound; such appeal being to the Grand Lodge. Plaintiff did not appeal, but, instead of appealing, brought this action for a declaration and other relief. Defendants do not dispute the jurisdiction of the Court, but appear to be willing that the rights of plaintiff should be determined in this action.

Unless this position taken by defendants makes a difference, I am bound to dismiss the action: *Essery v. Court Pride of the Dominion*, 2 O. R. 596; *Dale v. Weston Lodge*, 24 A. R. 351.

Does the submission of the defendants make any difference? I think not. Neither member nor "Order" can, I think, be permitted to make a court of justice a convenience for determining questions which ought to be disposed of in the domestic forum. And the maxim "*Boni judicis est ampliari jurisdictionem*" no more justifies the Court in reaching out for cases for decision than the other maxim "*Interest reipublicæ ut sit finis litium*" would justify the Court in preventing actions being brought, or in refusing to decide them when properly brought.

The action, therefore, will be dismissed, but without prejudice to any other action being brought after the remedies provided by the constitution of the Order are exhausted. It is not a case for costs.

No doubt a *modus vivendi* can be arrived at in the meantime, either by plaintiff discontinuing the practices objected to, or by defendants accepting the premiums without prejudice. It is eminently a case for an amicable arrangement.

I should add that in case it be considered that the merits of the dispute should be gone into, the Divisional Court will be in as good a position as the trial Judge for determining these. The facts of the plaintiff's employment as stated by himself are admitted by the defendants, and no question of credibility of witnesses can arise.

CARTWRIGHT, MASTER.

NOVEMBER 19TH, 1906.

CHAMBERS.

COLLIER v. HEINTZ.

Pleading — Statement of Claim — Action for Damages for Breach of Contract by Brokers to Purchase and Deliver Shares—No Allegation of Tender or Payment of Price—Amendment.

Motion by defendants to strike out paragraph 3 of the statement of claim as embarrassing.

The facts appear in a previous report, ante 340.

Grayson Smith, for defendants.

S. T. Medd, Peterborough, for plaintiff.

THE MASTER:—Paragraphs 1 and 2 of the statement of claim allege purchase of the shares in question by plaintiff, through defendants as his brokers, and refusal by them to deliver when requested. Paragraph 3 is as follows: "The plaintiff has always been ready and willing to take delivery of the said stock and pay any sum that was legally due by him to the defendants."

For the motion *Bloxam v. Sanders*, 4 B. & C. 941, was relied on. This shews that, admitting the purchase by defendants for plaintiff, this does not give any right to possession until payment or tender of the price.

It is clear that neither of these facts is positively alleged. *Rawson v. Johnson*, 1 East 203, was cited on the other side. That, however, was an action for breach of an agreement to sell and deliver malt. It was there said by Lord Kenyon, C.J.: "The defendant undertook to deliver the malt when he should be requested, and the plaintiffs plead that they made the request to him and were ready and willing to have accepted and paid for it, but that he did not deliver it when requested or at any other time, but refused to do so." This was held in such a case to be a sufficient allegation, though at the trial plaintiffs would have to prove that they were prepared to tender and pay the money if the defendant had been ready to carry out the contract.

Affidavits have been filed by both parties on this motion. From that of plaintiff it would seem that his contention really is that the shares were paid for before they were bought, as defendants had, as he thinks, sufficient of his funds in their hands for that purpose. He also alleges an offer "to pay the balance due on said purchase, if any"—but neither payment nor tender is otherwise set up.

Plaintiff should amend so as to let the defendants know which of these allegations they have to meet. It would almost seem that the question is really one of account between the parties.

Plaintiff should amend, and defendants have full time to plead in answer.

The costs of this motion will be to defendants in the cause.

CARTWRIGHT, MASTER.

NOVEMBER 20TH, 1906.

CHAMBERS.

GERMAN AMERICAN BANK v. KEYSTONE SUGAR CO.

Summary Judgment—Rule 603—Delay in Applying — Defences—Dismissal of Motion.

Motion by plaintiffs for summary judgment under Rule 603.

W. D. Gwynne, for plaintiffs.

George Bell, for defendants.

THE MASTER:—The action is on a promissory note, and was commenced on 20th June. The defendant appeared on 10th July. The present motion was not launched until 12th November instant.

The delay is not explained. This seems to bring the case within the principle of *McLardy v. Slateum*, 24 Q. B. D. 504, cited and approved in *Ontario Bank v. Farlinger*, 7 O. W. R. 315.

In the former case it was said: "The view taken by other Judges and by the Masters is that the intention of the Order was that the plaintiff should apply within a reasonable time after the appearance of the defendant." Had the statement of claim been delivered in September, the action would have been disposed of before this motion was launched; so that the plaintiffs would not seem to have been very anxious to obtain what they are now seeking. The venue is at Toronto.

The defendants . . . have set up three defences. Some of these (if not all) do not seem very substantial. But, in view of the whole circumstances, I think defendants should be allowed at least to deliver a statement of defence. Then perhaps plaintiffs will be able to get judgment on the pleadings without a trial. If a trial is necessary, defendants must facilitate this in every way so that the case can be heard at the present non-jury sittings.

Costs will be in the cause. . . .

BRITTON, J.

NOVEMBER 20TH, 1906.

CHAMBERS.

HARRISON v. BOSWELL.

Pleading—Statement of Claim—Amendment after Issue Joined and Parties Examined for Discovery—Leave to Set up Fraud—Discretion—Appeal—Costs.

Appeal by plaintiff from order of a local Judge refusing leave to plaintiff to amend statement of claim.

J. H. Spence, for plaintiff.

W. E. Middleton, for defendant Boswell.

Beattie, London, for defendant Kincaid.

BRITTON, J.:—The question presented for decision on this appeal is one of some nicety and of considerable difficulty. The question is, should plaintiff, who brought suit against defendants Boswell and Kincaid, and who in his statement of claim alleged a cause of action not against the defendants jointly, but against Boswell as the owner of premises and so liable for repairs which plaintiff did, and against Kincaid upon his alleged promise to pay for these repairs, be allowed to amend by setting up an entirely different cause of action against Kincaid alone, and alleging fraud on the part of Kincaid in obtaining money from plaintiff, and alleging that part of the money so fraudulently obtained from plaintiff is now held by Kincaid in the bank as trustee for defendant Boswell. Upon the new cause of action stated in the proposed amendment, defendant Boswell would be affected only to the extent of restraining her from disposing of money which Kincaid says he holds as trustee for her, to which money plaintiff makes a claim.

I have come to the conclusion, upon a consideration of the very wide language of Rule 312, and of the cases to which I was referred, and other cases, that the amendment should be allowed. Plaintiff should have an opportunity, and in this action, of determining the position of defendant Kincaid, as between the parties, and, if entitled to any part of the \$1,100, to get it without being compelled to institute a new action against Kincaid, or against both defendants.

The question before me is of amendment before trial. Issue has been joined upon the claim presented by plaintiff's original statement of claim, and unless plaintiff chooses to abandon that claim there must be a trial. The parties have been examined at very considerable length and upon the case which plaintiff desires to present by the amendment asked. A great deal of expense will be saved by having the whole matter tried out in the present action, instead of compelling plaintiff to start afresh. Indeed, after reading the depositions, I feel compelled to make the amendment asked, as it is necessary for "the advancement of justice, determining the real matter in dispute, and best calculated to secure the giving of judgment according to the very right and justice of the case."

What is asked by the amendment is a matter in dispute; it was so when the interim injunction was obtained; it was so when the examination of plaintiff and defendants took place. Defendants in the examination appear to me to have proceeded upon the theory that plaintiff was not limited to the precise claim as in the statement of claim. . . .

[Reference to *Raleigh v. Goschen*, [1898] 1 Ch. 73.]

The other case strongly relied upon by defendants is *Hendricks v. Montagu*, 17 Ch. D. 638, in which Jessel, M.R., stated his rule to be not to allow any amendment in which fraud is charged. That rule was stated as a general rule, but the Master of the Rolls said: "I do not as a rule allow amendments to make a charge of fraud at a time when a case is launched independently of fraud. . . . Of course, like all my rules, it is not an absolute rule. I make an exception to it if I see good ground for doing so, but generally it is my rule."

I follow this. It clearly states the position. This, in my opinion, is a case for the exception. There is good ground for allowing at this stage the amendment asked.

A further rule was laid down by Lord Esher in *Steward v. North Metropolitan Tramways Co.*, 16 Q. B. D. 556: "The amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs; but if the amendment will put them into such a position that they would be injured, it ought not to be made." See *Williams v. Leonard*, 16 P. R. at p. 549.

This amendment will not in any way put defendants or either into the position that they or either of them must be injured. They will not be made liable upon the amended pleading unless the evidence warrants it, and plaintiff is entitled to be heard and in this action.

It was argued that the discretion of the local Judge, who refused leave, ought not to be interfered with. This is very different from the exercise of discretion at the trial by a trial Judge. At this stage of the proceedings, plaintiff should be allowed as of right, upon terms, to amend.

The appeal will be allowed, the order dismissing plaintiff's motion for leave rescinded, and plaintiff is to have the leave to amend as asked. Costs of motion to amend and of the amendment to be costs to the defendants in any event. Costs of this appeal to be costs in the cause. Defendants may re-examine plaintiff for discovery if they desire to do so, and plaintiff to attend at his own expense upon an appointment for such examination.

ANGLIN, J.

NOVEMBER 20TH, 1906.

TRIAL.

McMURCHIE v. THOMPSON.

Chose in Action—Voluntary Assignment of Fund to Wife of Assignor—Informality—Validity as Equitable Assignment—Subsequent Assignment for Value—Priority—Notice to Holders of Fund—Executors—Oral Notice to One.

An interpleader issue to determine whether defendant, a prior volunteer assignee, or plaintiffs, subsequent assignees for value, should be held entitled to the proceeds of the share of the deceased husband of defendant under the will of his father.

E. L. Dickinson, Goderich, for plaintiffs.

W. Proudfoot, K.C., for defendant.

ANGLIN, J.:—James Thompson sen., who died on 6th July, 1885, bequeathed to his son James (the late husband

of defendant) and to his sons Edward and William, in equal shares, the residue of his estate, subject to an annuity to his widow of \$125. The executors retained, under the directions in the will, to meet this annuity, a sum of money, in which, with accumulated interest thereon, the share of James Thompson, on the death of his mother, amounted to \$574.18. This sum, less costs of payment in, etc., taxed at \$25.82, was, by order of a local Judge, made on application of the executors, paid into Court to abide the result of the interpleader issue by such order directed.

Defendant married the late James Thompson jun. early in 1893. According to her evidence, she shortly afterwards pressed her husband, who was addicted to drinking habits, to make some provision for her. She swears that he then said he would at once transfer to her his interest in his father's estate, and that he immediately wrote and handed to her the following document, which she produces: "Petrolia, July 18th, 1893; I have assigned all that I possess to Misses Jas. Thompson. James E. Thompson." In the following year she says he executed and gave to her this further assurance: "Petrolia, April the second, 1894; if anything was to happen to me I leave to my wife Jennie Thompson the money that belongs to me by my father's will after mother death to be handed over to her and all other estate that I should possess and money. James Thompson, Petrolea."

Upon the evidence of Mrs. Thompson, and having had the opportunity of comparing these documents with papers which are admittedly in the handwriting of her deceased husband, I find that both are genuine, and have no doubt that both were prepared and given her in the circumstances which Mrs. Thompson describes.

The second document, which is, in my opinion, testamentary in character, of itself avails nothing; but it affords a strong indication of the probability of the story which defendant tells.

I therefore find that James Thompson jun., deceased in 1903, intended to assign and did in fact assign by parol to his wife . . . all his estate capable of being so transferred, including specifically his interest in the estate of his deceased father.

Although this assignment was voluntary, it was binding and effectual, because, dealing with property incapable of legal transfer, the assignor did everything in his power to make a complete assignment, and left undone nothing material thereto. As against him, there was a complete gift to his wife of his share in the estate of his father: *Harding v. Harding*, 17 Q. B. D. 442, 445; *Lee v. McGrath*, 10 L. R. Ir. 45, 49. This assignment, made in 1893, was not within the scope of . . . R. S. O. 1887 ch. 122, sec. 6, which was restricted to "debts and choses in action arising out of contract." It stands, therefore, as an equitable assignment of a chose in action incapable of legal transfer, for which neither writing nor any particular form of words is requisite, provided the intention to make a present transfer is satisfactorily proven: *Trusts Corporation of Ontario v. Rider*, 27 O. R. 593, 24 A. R. 157. As the assignment . . . relates to property over which courts of equity had special jurisdiction, the assignee could sue in such courts in his own name.

The title of defendant being, therefore, complete, it only remains to determine whether she preserved her priority as against plaintiffs, who hold subsequent assignments for value, of which formal notice was duly given to the executors, in whose hands the fund lay. Mrs. Thompson swears that in 1895 or 1896, shortly after she had separated from her husband, she, accompanied by her brother, called on William Bryan, one of the executors, and advised him of the fact that her husband had transferred his interest in the estate to her. Her brother fully corroborates her statement. William Bryan admits that Mrs. Thompson and her brother called on him and spoke about "her right to this money," but he cannot remember whether this was prior or subsequent to his receipt of notice of the claim of plaintiffs, of which he was notified early in 1897. He is, however, quite certain that Mrs. Thompson did not inform him that she held an assignment from her husband. Upon this conflicting evidence the finding must be in favour of defendant, whose positive testimony is strongly and directly corroborated by that of her brother. Having gone to Mr. Bryan for the express purpose, as she and her brother both say, of imparting to him information as to the assignment which she held, their recollection of what was actually said is more likely to be accurate and reliable than his. Since

. . . Ward v. Duncombe, [1893] A. C. 369, it is impossible to contend successfully that notice to one of several trustees, not himself the assignor, is not effective to secure the priority of the assignee who gives such notice over subsequent assignees.

There must, therefore, be judgment for defendant; and plaintiffs should pay her costs of this issue and of the application upon which it was directed.

CARTWRIGHT, MASTER.

NOVEMBER 23RD, 1906.

CHAMBERS.

HOWLAND v. CHIPMAN.

Parties — Joinder of Defendants — Pleading — Statement of Claim—Multifariousness—Embarrassment.

Motion by defendant Chipman for an order requiring plaintiff to elect whether he will proceed against the applicant or his co-defendant, or to strike out parts of paragraphs 15, 17, and 19 of the statement of claim.

C. A. Moss, for defendant Chipman.

W. H. Blake, K.C., for plaintiff.

THE MASTER:—The action is brought against Chipman and the executrix and sole devisee under the will of the late W. H. Howland, plaintiff's son and former partner.

The statement of claim alleges that plaintiff and his son were in partnership, under which plaintiff was entitled to be paid by his son two sums of \$85,000 and \$55,000; that as such partner and with the money of the firm, the deceased acquired stock in what is now the Crow's Nest Pass Coal Company; that he always admitted his liability for the two sums above mentioned (which were to be paid out of the proceeds of said stock), and also to convey to plaintiff half of the said stock; that the said son died in December, 1893, leaving these matters unsettled; that the deceased made his wife sole executrix and devisee; that she almost at once left this province and has never returned, the control

of her husband's estate being given by her to defendant Chipman; that it was always represented to plaintiff that the stock in question was valueless, and that otherwise he was refused any information; that Chipman has now in his own name and control stock of the company to the value of \$200,000, to which he has no right or title; and that his co-defendant has stock to the amount of \$500,000 or thereabouts.

Plaintiff accordingly asks: (1) a declaration that the deceased held the stock in question as trustee for himself and plaintiff equally; (2) for an inquiry as to the dealings of defendants with the stock and for an order for delivery to plaintiff of his share or interest therein; and (3) payment of the sums of \$85,000 and \$55,000 out of the share of the deceased in the trust estate, with interest.

The motion was supported on the ground that these defendants could not be joined in one action, because the claims against them were separate and distinct, as Chipman was not interested in the claim for the \$140,000, so that under the former practice the bill would have been demurred to successfully as being multifarious.

Unless this objection is valid, the motion must fail according to the principle in *Andrews v. Forsythe*, 7 O. L. R. 188, 3 O. W. R. 307, and cases cited, especially *Evans v. Jaffray*, 1 O. L. R. 614. . . .

[Reference to *Daniell's Chancery Pleading and Practice*, 1st Am. ed., p. 384; *Salvidge v. Hyde*, 5 Madd. 138, *Jacob* 151.]

Although in some sense the claim to be repaid the \$140,000 is separate, and one in which Chipman is not concerned, yet the main relief is to have the trust as to the stock declared and carried out. These matters are certainly not in their nature separate and distinct, but are such as are properly and necessarily united as against the executrix, and the fact that Chipman is "a necessary party to some portion only of the case stated" does not allow him to maintain an objection of multifariousness: per Lord Cottenham in *Attorney-General v. Poole*, 4 My. & Cr. 17, at p. 31.

For these reasons it seems that plaintiff cannot be required to elect. There would appear in this case even more than in *Evans v. Jaffray*, *supra*, to be "such unity in the

matters complained of" as not only justifies but requires the retention of the moving defendant.

Then as to the motion against parts of paragraphs 15, 17, and 19 of the statement of claim.

As to the first of these no valid objection can be taken. The statement is of fact which plaintiff will rely on to account for the delay in bringing this action.

The allegation in paragraph 17 is introduced as a reason for making Chipman a defendant and requiring him to account for the stock in his possession.

The 9 or 10 words objected to in paragraph 19 do not seem in any way embarrassing. The paragraph simply repeats in a concise way the allegation that the stock held by both defendants belongs in part to plaintiff, and as to the rest to the estate of the plaintiff's deceased son. . . .

The main question is one of some difficulty, so that the costs may be in the cause.

CARTWRIGHT, MASTER.

NOVEMBER 23RD, 1906.

CHAMBERS.

REID v. GOOLD.

Parties—Addition of Defendant—Motion by Original Defendants—Guarantors of Promissory Note — Avoidance of Multiplicity of Proceedings—Judicature Act.

Motion by defendants, who were sued as guarantors of a promissory note, for an order adding the maker as a defendant.

W. T. Henderson, Brantford, for defendants.

S. C. Biggs, K.C., for plaintiff.

THE MASTER:—About a year ago a limited company bought machinery from plaintiff, and gave the note sued on as payment.

The note was for \$1,935.46, and payable in a year. Before maturity the company were claiming from plaintiff

\$953.46 or thereabouts for breaches of the agreement of sale.

Plaintiff shortly afterwards sued the guarantors, who have paid into Court \$1,195.01, as being all that is justly due. In their statement of defence they allege that plaintiff agreed when the note was given that the exact amount should be adjusted during the currency of the note.

No doubt what is the correct application of Rule 206 (sub-sec. 2) is not always obvious. This question was lately considered in *Imperial Paper Mills v. McDonald*, 7 O. W. R. 472, where the ruling cases are cited. The reasons of the Chancellor in that case would seem to justify the present motion, . . . for which reliance was placed on *Montgomery v. Foy*, [1895] 2 Q. B. 321, and it was argued that here the real question in controversy is whether any greater sum than the \$1,195.01 paid into Court is due to plaintiff, and if that is so, then the presence of the company is necessary so that the whole matter arising out of the contract may be disposed of in one action, which is one of the cardinal principles of the Judicature Act. Otherwise the defendants in this action would be obliged to get the company to bring a new action against plaintiff for damages. It was said by Lord Esher in *Montgomery v. Foy*, *supra*, at p. 325, that *Norris v. Beazley*, 2 C. P. D. 80, which was relied on in opposition to the motion, was open to observation, being decided at an early stage of the decisions on the Judicature Act. In the same case *A. L. Smith, L.J.*, at p. 328, pointed out that if such an action for damages was brought, while the first action was pending, the Court would order them to be tried at the same time, so that only the true balance should be paid to plaintiff.

It will be seen that in *Norris v. Beazley*, the action was against the person primarily liable. Even there the decision seems to have proceeded on the ground that plaintiff had no possible claim against the Niger Company in respect of the acceptance, as the company was not in existence when it was given. And *Denman, J.*, put his decision on the ground that the company was not a "necessary party" within the meaning of the Rule. *Grove, J.*, also relies on the fact that the contract there was only between plaintiff and defendant and that the Merchants Company had nothing to do with the acceptance sued on.

The facts of the present case are widely different and much more favourable to the motion, which I think should be granted in the interests of justice and also of all the parties concerned. The guarantors should not be required to pay more than the amount which plaintiff is entitled to recover, on the contract of which the note sued on forms part. The company which gave the note should not be obliged to bring a separate action for damages, when that claim can be conveniently and properly disposed of in this action, as it would have been had the company been made a defendant originally.

The plaintiff will in this way be saved the risk of having to defend an action in Alberta, where the company's mill is situated, and where, it may be, their head office is situated.

Above all, the interests of justice, as defined by the Judicature Act, sec. 57, sub-sec. 12, would seem to require that wherever it can possibly be done without injustice or inconvenience one action should be sufficient "for the determination of all the matters which must be dealt with before the rights of the parties are finally settled:" per Meredith, C.J., in *Morton v. Grand Trunk R. W. Co.*, 8 O. L. R. 381, 4 O. W. R. 126, and so "multiplicity of legal proceedings concerning any of such matters may be avoided:" Judicature Act, *supra*. . . .

The costs will be in the cause, as this question is always one of some difficulty.

NOVEMBER 23RD, 1906.

DIVISIONAL COURT.

ANDERSON v. NOBELS EXPLOSIVE CO.

Writ of Summons — Service out of Jurisdiction—Cause of Action—Rule 162 (e)—Tort Committed in Ontario—Injury to Plaintiff by Defective Fuse Supplied to his Employers by Defendants in Foreign Country.

Appeal by plaintiff from order of MAREE, J., ante 558, affirming order of Master in Chambers, ante 439, setting

aside order obtained by plaintiff allowing service upon defendants in Glasgow, Scotland, of the writ of summons and statement of claim, and dismissing the action, which was brought to recover damages for injuries sustained by plaintiff in Ontario owing, as alleged, to the premature explosion of a defective fuse manufactured by defendants, and used by plaintiff's employers in Ontario.

T. N. Phelan, for plaintiff.

W. H. Blake, K.C., for defendants.

The judgment of the Court (MULOCK, C.J., ANGLIN, J., CLUTE, J.), was delivered by

ANGLIN, J.:—Notwithstanding the brilliant and ingenious argument presented by counsel for the appellant, it seems clear that service of the writ of summons in this action out of the jurisdiction should not be permitted. It is only where the tort for which the plaintiff brings action has been committed within Ontario that Rule 162 (e) entitles him to ask the Court to entertain an action against a non-resident defendant who is to be served with process abroad.

Assuming that the plaintiff had a cause of action against these defendants (a question with which it is unnecessary to deal, but which it is by no means clear should be determined in plaintiff's favour: *Winterbottom v. Wright*, 10 M. & W. 109; *Earl v. Lubbock*, [1905] 1 K. B. 253; *Collis v. Selden*, L. R. 3 C. P. 495; but see *Parry v. Smith*, 4 C. P. D. 325; *Elliott v. Hall*, 15 Q. B. D. 315; *Farrant v. Barnes*, 11 C. B. N. S. 553:) I find myself quite unable to follow Mr. Phelan's argument that the tort which gave rise to that cause of action was "committed" within Ontario. The charge preferred against the defendants is that they were "negligent in allowing the fuse (which injured the plaintiff) to be manufactured and sold in a defective condition." How this fuse reached the employers of the plaintiff is not alleged or suggested. The manufacture and the sale by defendants, negligence in both of which plaintiff alleges as the tort or wrong committed by defendants, must, in the absence of any contrary allegation, be deemed to have taken place in Scotland, where the defendants carry on business. If these alleged negligent acts constitute the wrong done

by defendants, though a result of that wrong—perhaps a more or less direct result—may have been injury sustained by plaintiff in this province, it seems to me impossible to maintain that such wrong or tort was committed in Ontario, or elsewhere than in Scotland. It is true that the invasion of plaintiff's right of personal security occurred in this province, but a wrong or tort comprises also the wrongful act or omission of the alleged tort-feasor. Before it can be said that a tort has been committed in Ontario, within the meaning of Rule 162 (e), it must be established, I think, that the wrongful act or omission of the tort-feasor, which caused the injury to the plaintiff, took place in this province. That is not, and could not well be, alleged by the present plaintiff; and, if it were, the Court, in the exercise of the discretion which it certainly possesses in regard to the application of the provisions of Rule 162 (e), should, in such a case as that now before us, decline to permit service out of the jurisdiction.

The appeal fails and must be dismissed with costs.

NOVEMBER 23RD, 1906.

DIVISIONAL COURT.

SHERLOCK v. CITY OF TORONTO.

Contract—Work and Materials on Building—Time Fixed for Completion — Delay of Owner of Building — Increase in Cost of Materials — Contract Price — Correspondence — Quantum Meruit.

Appeal by plaintiff from judgment of BOYD, C., dismissing the action.

Plaintiff contracted with defendants for a fixed sum of \$2,050 to perform certain work on a building called the manufacturers' building, to be erected by defendants, the contract requiring the work to be completed on or before 2nd August, 1902.

Defendants omitted to erect the building before 2nd August, 1902, thus making it impossible for plaintiff to perform his contract within the stipulated period, and it was not until March, 1903, that the building had been so far completed as to enable plaintiff to commence his work.

In the meantime the cost of performing the work covered by the contract had increased by \$390.80.

On 25th February, 1903, defendants' architect wrote to plaintiff urging an early start with his work.

After certain communications between plaintiff and representatives of defendants, plaintiff, about 8th April, 1903, began the work and ultimately finished it, and this action was brought to recover \$390.80, being the increased cost over the original contract price of \$2,050, to which he was put because of an increase in the cost of labour and material.

The appeal was heard by MULOCK, C.J., ANGLIN, J., CLUTE, J.,

C. A. Masten, for plaintiff.

J. S. Fullerton, K.C., and F. R. MacKelcan, for defendants.

MULOCK, C.J.:—The question arises, on what terms did plaintiff perform the work? He had not made a commencement prior to the time named in the contract for its completion. True, he had purchased some materials, but they had remained his property. He was not bound to perform the work at a subsequent time, nor under conditions different from those contemplated by both parties when the contract was entered into. That would have been a different contract: *Bush v. Trustees of the Port and Town of Whitehaven*, *Hudson's Building Contract*, 2nd ed., vol. 2, p. 121.

Defendants' default went to the root of the contract, and entitled plaintiff to treat it as at an end: *Poussard v. Spiers*, 45 L. J. Q. B. 621. He does not, however, appear to have done anything until after the receipt of the architect's letter of 25th February, 1903. In the meantime defendants had been getting the building ready for the work described in plaintiff's contract, and on that day the architect wrote plaintiff as follows: " . . . I trust you will lose no time in getting your material ready for a very early start, as the building is in an advanced state now, and ready to receive attention on your part."

The contract provided that plaintiff's work should be done to the satisfaction of defendants' architects, and this letter from one of those officers was an intimation that he

expected the work to be executed, except as to time, in accordance with the terms of the original contract. On 25th March, 1903, plaintiff wrote to the defendants' Board of Control that, as he had been unable to complete his contract by 2nd August, 1902, he would require an additional sum of \$390 to complete it, and on 2nd April he appeared before the Board of Control and advised them as to his demand for \$390, when Mr. Loudon, one of the members, said: "Now, Sherlock, you go ahead, and we will do what is fair with you." It does not appear that the Board authorized or indorsed this statement, and apparently the plaintiff did not accept it as the decision of the Board, but merely the view of one member, for in answer to another letter from the architect of 3rd April complaining of delay and insisting on an immediate start, plaintiff replied enclosing a copy of his statement to the Board and adding: "I had an interview on Thursday April 2nd with the Board and explained my position in reference to starting the work on said building. I am waiting their reply to the above statement." As he received no communication from the Board, the fair inference, I think, is that he did not start his work on the faith of Mr. Loudon's remark. No doubt plaintiff was aware that Mr. Loudon could not bind defendants, and something more was necessary in order to charge them.

The architect, however, left no doubt as to the terms on which he required the work to be performed, for on 8th April he wrote to plaintiff stating that he had instructions from the Parks and Exhibition Committee to give him notice to deliver material and proceed, failing which he was liable to instant dismissal on his failure to comply with the notice, and concluding: "I am instructed to employ other persons to finish the work, charging the cost thereof against your contract."

This is the notice provided for in the contract in order to take the work out of the contractor's hands, and was the clearest intimation that plaintiff's demand for an additional allowance was not acquiesced in, and that if he went on with the work it would be under the terms of the contract, except as to date of completion.

Without saying more, plaintiff began his work, and on 21st April wrote the architect saying: "Please find enclosed list of labour and material deposited and erected by me at the manufacturers' building . . . total \$1,000."

On 23rd April, 1903, the architect issued to plaintiff a progress certificate in the following words: "To R. T. Coady, City Treasurer. This is to certify that Mr. James Sherlock has performed portion of his contract for the plumbing and drain work on your manufacturers' building, entitling him to a payment of \$500 of his contract, dated March 18th, 1902.

"Amount of contract\$2,050
 "Amount of his certificate..... 500
 "Balance after payment\$1,550."

This is receipted as follows: "Received payment,

James Sherlock, 24 April."

Thereafter further progress certificates, similar in language, were issued, and the amount thereof accepted and receipted for by plaintiff, until it came to the certificate for the balance, \$150. For this plaintiff gave no receipt. He states that each time of presentation of his certificates to the treasurer for payment he protested in respect of his additional claim.

On 26th May the architect wrote plaintiff as follows: "Pursuant to the terms of the contract between you and the corporation of Toronto, dated 18th March, 1902;" and then went on to complain of delay, threatening dismissal and the employment of others "to finish the work as provided in the contract." To this the plaintiff replied: " . . . I have called repeatedly for a progressive certificate for \$500, for which I think according to agreement I am entitled to." To what agreement does he refer if not the contract of 18th March, 1902? Further correspondence took place, throughout which the architect continued to refer to the "contract," and on 15th January, 1904, plaintiff rendered to the architect an account as follows:

1903	To plumbing manufacturers' building, exhibition grounds, as per contract	\$2,050
	Indemnity account	390
		<hr/>
		\$2,440
	Credit by cash on account.....	1,600
		<hr/>
		\$840

On 21st October, 1904, the architect issued his final certificate for the balance of the \$2,050, adding: "Your indemnity claim by reason of detention will have to be adjusted by the Board of Control, as that is something that does not come under my duties to adjust."

The foregoing references to the evidence shew that this case differs materially from *Bush v. Trustees of Whitehaven* (supra). There the work was begun within the time provided by the contract, but the action of defendants prevented its completion within the time agreed upon; the contractors nevertheless continued the work, without objection from the other party to the contract, and it was held that, the conditions having materially changed, both parties must be regarded as allowing the work to go on under the altered conditions, and as giving to the contractors a claim in respect of the increased cost because of the delay. But that is not the present case. Here, because of defendants' default (plaintiff not having been able to commence his work within the time provided for its completion), he had the right to treat the contract as at an end, and if the defendants were guilty of a breach, his remedy was an action for damages. He did nothing, however, until called upon by the architect to perform the work. Thereupon he advanced a claim for the additional sum in question. This defendants did not assent to, and plaintiff was notified by the architect that he must proceed under the contract. This he did. He was not obliged to have done so, but, having done so, he cannot now take the attitude that the terms of the contract (except as to time) do not determine the rights of both parties. Before beginning the work, plaintiff having raised the question of an increased price, and defendants through their architect having refused to entertain the demand, and having notified plaintiff that if he would not perform the work at the price named in the original contract, it would be given to others, the inference is, I think, that in order to retain the work, plaintiff elected to abandon his claim and to execute the work at the price named in the original contract. But for so doing, he would have lost any advantage from performing the work, and have been left to whatever legal rights he was entitled to, because of defendants' default. The terms of the contract having by the conduct of the parties been made applicable to the belated work, and plaintiff having for valuable consideration

abandoned his claim, nothing remains entitling him to recover by way of quantum meruit. This appeal should therefore be dismissed with costs.

ANGLIN, J., gave reasons in writing for the same conclusion.

CLUTE, J., dissented, for reasons also given in writing.

OCTOBER 2ND, 1906.

DIVISIONAL COURT.

MAHONEY v. CANADA FOUNDRY CO.

Third Party Procedure — Master and Servant — Action for Death of Servant — Negligence — Condition of Railway Track — Breach of Implied Warranty of Safety — Relief over—Damages—Other Actions Arising out of same Accident—Notice of Trial of Third Party Issue.

Appeal by the Guelph and Goderich Railway Company, the third parties, from an order of BOYD, C., made on 25th September, 1906, reversing an order of the Master in Chambers of 29th June, 1906, by which he set aside an ex parte order giving leave to serve a third party notice upon the appellants.

Shirley Denison, for the third parties.

J. A. Paterson, K.C., for defendants.

T. R. Phelan, for plaintiff.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.), was delivered by

MEREDITH, C.J.:—The action is brought by the personal representatives of a deceased person who was in the employment of defendants engaged as a conductor upon a train—I suppose it may be called—which was employed in the erection of a bridge on the line of the third parties' railway, which was in course of construction, to recover damages for his death.

The plaintiff's claim alleges various acts of negligence as the basis of the action, but contains no specific allega-

tion that there was any negligence on the part of the defendants owing to the condition in which the track upon which the train was moving was; and in the affidavits which the defendants file for the purpose of obtaining the leave they say in terms that the accident was caused by the subsiding of the tracks, for which they were in no way responsible.

The Master thought that the case was one in which it was not proper that the third party proceedings should be allowed, and, as already indicated, he discharged the *ex parte* order. The Chancellor, however, reversed that order, directed that the third party should go to trial at the present sittings, at which the case is entered for trial, and provided what in terms the Rules provide, that plaintiff shall not be prejudiced or unnecessarily delayed by the third party proceedings.

It is somewhat strange, and there was no explanation given of it, that, although the order of the Master in Chambers setting aside his *ex parte* order was made on 29th June, the appeal from that order was not brought on to be heard until late in the month of September. There was nothing, so far as I am aware, to prevent the appeal having been brought on in vacation and the matter then disposed of.

Plaintiff, as I have said, has set his case down for trial, and he objects to the third party proceedings as unnecessarily delaying the trial; and the third parties appeal on the ground that the case is not one for a third party notice.

We do not agree with the argument of Mr. Denison, that if the case were not complicated by the circumstances to which I shall afterwards refer, it would not be one proper for the third party notice.

In substance, so far as the defendants are setting up a claim against the third parties, it is a claim for a breach of either an express or an implied warranty that the track was safe and sufficient; and if the defect in the track were the sole cause of the accident, and the case were not complicated by other circumstances, *Confederation Life Association v. Labatt*, 18 P. R. 258, a decision of a Divisional Court, would be a direct authority that such a case is a proper one for third party proceedings. That was an action brought for the conversion of goods: the defendant sought to bring in by the third party proceedings the person who had sold him the

goods, claiming relief over founded upon either an express or an implied warranty of title upon the sale of the goods; and it was held by Mr. Justice Meredith in the first instance and afterwards on appeal by a Divisional Court that it was a case coming within the Rule for third party proceedings.

There is, however, in addition to the circumstances I shall refer to, the fact that, according to the allegation of defendants, if the accident was caused by the subsiding of the track, that was outside of their control, and they are not liable. If that be so, the case is not one for third party proceedings.

There is not only the action by Mahoney, but also two other actions, one by representatives of a workman who was killed, and the third by a workman who was injured in the same accident; and also there may be a third claim,—although Mr. Paterson indicated that that might not be pressed—by the defendants for the damage done to the derrick.

Now it seems to me it would be improper that the third parties should be subjected to have the damages for which, if they are liable at all, they are liable for upon their breach of their warranty or undertaking, or whatever it was, to provide a safe and sufficient track, assessed piecemeal. If the third party notice is permitted to stand, there will be an assessment of part of the damages now; then it may be that if third party proceedings are taken in the other cases, there will be separate assessments there also, or if third party proceedings are not taken in those cases, there would be the necessity of an action by defendants against the third parties for the damages which they will claim to have suffered, if they fail in the actions.

Looking at that circumstance, and having regard to the terms of the Rule that the plaintiff is not to be prejudiced or unnecessarily delayed, we think the order of the Chancellor ought not to stand.

The plaintiff, as I have said, has his case entered for trial, and is ready to go on, and if, according to the practice, the result of an order letting in the third party to defend is to open the pleadings and to require a new notice of trial and a new entry of the cause, the result will be that the plaintiff will be thrown over until the next sittings of the Court for the trial of jury cases.

In *Confederation Life Association v. Labatt*, Mr. Justice Rose held that the effect of an order giving the third party leave to defend was to open the proceedings, and that he was entitled to a new notice of trial. That case has apparently been recognized as laying down the proper practice in that respect, and therefore the result of allowing this order to stand would be, if upon the order for directions the third party was permitted to defend, that the plaintiff would be thrown over until the next sittings of the Court for the trial of actions with a jury.

Upon principle, I do not see why the third party should not be entitled to the same notice of trial that he would be entitled to if he were defendant to an action brought by the defendant against him. It is practically a cross-action, and it is settled that there is no power in the Court to abridge the time allowed for service of a notice of trial.

It would be very desirable that the parties should all agree to be bound by the trial in this action as to the cause of the accident; but we are unable to force the parties to agree to that, and apparently the third parties are unwilling to agree.

We think, therefore, it would be unjust to the plaintiff and not convenient that the third party proceeding should be permitted to go on, and the result, therefore, is that the appeal must be allowed, and the order of the Master in Chambers must be restored; the appellants will have their costs of the appeal to the Chancellor and of this appeal, to be paid by the defendants, and the costs of the plaintiff of the two appeals will be costs to him in any event of the action.

ANGLIN, J.

NOVEMBER 24TH, 1906.

TRIAL.

SMITH v. SMITH.

Dower—Lands Subject to Charge for Maintenance—Exchange for Other Lands—Conveyance to Chargee—Recital—Evidence to Contradict—Right to Dower Subject to Charge and to Lien for Improvements—Costs.

Action for dower, tried without a jury at Milton.

G. H. Kilmer and D. O. Cameron, for plaintiff.

G. H. Watson, K.C., J. G. Farmer, Hamilton, and J. W. Elliott, Milton, for defendant.

ANGLIN, J.:—Plaintiff sues to recover dower out of certain property in the town of Oakville. Her deceased husband, Miles H. Smith, under the will of his father, who died in 1886, became the owner of two farms known as “the Homestead farm” and “the Brethour farm,” charged with certain provisions in favour of his sister, which have been satisfied, and with the maintenance of his mother, the defendant, during her widowhood. In November, 1890, Miles H. Smith borrowed . . . \$2,000 from one Thomas to enable him to go into business at Oakville, giving as security a mortgage on the Brethour farm, in which his mother, the defendant, joined as a mortgagor. In May, 1891, Miles Smith arranged with one Turner to exchange the equity in the Brethour farm for the Oakville property in which plaintiff now claims dower. This Oakville property was free of incumbrances. The deed from Turner to Miles Smith bears date 12th May, 1891, and was registered in December of the same year. Meantime, on 23rd September, 1891, Miles Smith married the plaintiff. Defendant had, with her son, gone into possession of the Oakville property in May, 1891, and, upon his marriage, her son took his wife, the plaintiff, to reside there also. The marital relations of this pair were very unfortunate. After two separations within a year of their marriage, lasting each for several months, they separated a third time about April, 1893, and since that time plaintiff has resided with her father. The title to the Oakville property remained in the name of Miles Smith until December, 1895, when he made a general assignment for the benefit of his creditors to one Howarth. In February, 1896, Howarth, by deed which contains a recital that Miles Smith had satisfied the claims of all his creditors, reconveyed the Oakville property to Miles Smith. By deed dated 18th March, 1896, Miles Smith conveyed the Oakville property and his interest in the Homestead farm to his mother, the defendant. This deed contains recitals that the Oakville property had been conveyed to Miles H. Smith, instead of to defendant, by mistake, and that Miles H. Smith was indebted to defendant in the sum of \$2,380 and interest, on promissory notes; that defendant had instituted suit to recover these moneys and to establish

her claim for maintenance under her husband's will; and that, in consideration of the withdrawal of such suit, Miles Smith had agreed to convey the properties in the deed described to defendant. The grant is made in consideration of the premises and of . . . \$2. After some peculiar matrimonial adventures, in which plaintiff was not a participant, Miles Smith died in October, 1905.

Although several defences were pleaded to plaintiff's claim, there is no evidence before me justifying consideration of any defence except an alleged agreement made between defendant and her son, Miles Smith, as defendant asserts, in May, 1891, before her son's marriage to plaintiff, that, in consideration of defendant relinquishing her right to maintenance charged upon the Brethour farm, and joining her son in conveying that farm to Turner, he should hold the Oakville property . . . in trust for her. The conveyance to Miles Smith from Turner is in form absolute, containing no allusion to any trust whatever.

In her defence defendant pleads that the conveyance of the Oakville property was made to her son Miles through error and mistake, and should have been made directly to herself. The recital in the deed of 1896 from the son to the mother is of similar import. But in her evidence at the trial defendant said positively that it was, for some reason that she is quite unable to explain, clearly understood that the conveyance from Turner should be made to her son, and that he should, at some later date, transfer the property to her. Plaintiff joins issue on the defence pleaded. The question, therefore, for determination is whether Miles H. Smith acquired and held the Oakville property on trust to convey it to his mother. Plaintiff has not pleaded the Statute of Frauds in her reply as an answer to this alleged parol trust. In argument her counsel asked to be allowed by amendment to so plead. In the view which I take of the evidence, I shall not direct this amendment.

The evidence of defendant is in many respects not satisfactory; yet she was not at all shaken in her story that she joined in the conveyance of the Brethour farm only on condition and in consideration of her son acquiring the Oakville property for her. In corroboration she offers the evidence of her brother, John Wilson, who states that

Miles Smith told him in 1891 that he held the Oakville property for his mother, and that she was to have a deed of it; and also that of G. H. Morden, who says that Miles Smith told him that the Oakville property was acquired for his mother for her interest in the Brethour farm. But the daughter of defendant, also called on her behalf, who says she was living with her mother in 1891, and fully understood the arrangement upon which the exchange of the two properties was effected, stated that the understanding was that her mother's interest in the Oakville property would be the same as she had in the Brethour farm.

Plaintiff, on the other hand, swears that her then intended husband assured her, when negotiating for the Oakville property in May, 1891, that he was acquiring it as a home for himself and her. There is also the singular fact that, although fully aware that the title to this property stood in her son's name from 1891 (she says the deed to her son was in her possession), defendant took no steps to secure a transfer of it to herself until 1896; there is the further fact that this property was apparently treated as something which passed under the assignment from Miles H. Smith to Howarth in 1895; and there is the utter absence of any adequate explanation why the deed of this property was intentionally (as defendant swears) taken in the name of her son, if it were from the first also intended that it should be absolutely and entirely hers.

Again, the Brethour farm is sworn by witnesses for defendant to have been worth not more than \$2,500 to \$3,000 in 1891; the Oakville property was, I find upon the evidence, worth about \$3,500. On the former the mother had a charge for maintenance, which was also charged on the more valuable Homestead farm, where she had a right of residence as well. Her counsel in argument estimated the proportion of her maintenance which the Brethour farm should bear as three-eighths, the Homestead farm being in this view chargeable with the provision made for her residence, and also with five-eighths of the cost of her maintenance. So that, if defendant's story of the arrangement should be accepted in its entirety, upon the exchange of a mere three-eighths of her maintenance during her widowhood (exclusive of the provision for residence) upon a pro-

perty worth \$2,500 to \$3,000, she obtained the fee simple in a property worth \$3,500.

Looking at the whole evidence, and weighing as best I can all the probabilities, I have reached the conclusion that the daughter, Mrs. Chisholm, correctly stated the arrangement made in 1891, when she said that the agreement was that her mother should have in the Oakville property the same interest which she had formerly in the Brethour farm, namely, a charge of maintenance upon it jointly with the Homestead farm, to the exclusion of provision for her residence, which was, by her husband's will, charged expressly upon the Homestead farm. In this view, the making of the deed of the Oakville property to Miles H. Smith—wholly inexplicable upon defendant's own story—is quite readily understood. His conveyance to his mother in 1896, with its recital that the title had been vested in him by mistake, falsified by defendant's evidence, I cannot regard as aught else than an attempt on the part of Miles H. Smith and his mother to defeat whatever claim plaintiff—with whom Smith had then finally broken—might make to dower out of this property.

I, therefore, find plaintiff entitled to dower out of the Oakville property, subject to the right of defendant to a charge for maintenance thereon, to the extent to which she had a similar charge under her husband's will upon the Brethour farm, and also subject to any claim which defendant may have for permanent improvements made by her upon the Oakville property, to priority for which, it was conceded by counsel for plaintiff at the trial, defendant is entitled. . . .

[Judgment accordingly, with a reference to a Master.]

Plaintiff having succeeded in establishing her right to dower, but only subject to a charge in favour of defendant, which plaintiff did not admit—in the exercise of my discretion, I allow to plaintiff one-half of her costs of this action down to and inclusive of judgment, to be paid her by defendant. Further directions and subsequent costs reserved.

BRITTON, J.

NOVEMBER 24TH, 1906.

TRIAL.

PREST v. PREST.

Lunatic—Moneys Expended in Maintenance of Lunatic not so Found—Right to Recover—Ability to Contract—Necessaries—Evidence.

Action to recover moneys expended by plaintiff in the care and maintenance of defendant, a supposed lunatic, tried without a jury at Belleville.

E. G. Porter, Belleville, for plaintiff.

Malcolm Wright, Belleville, for defendant.

BRITTON, J.:—Plaintiff and defendant are brothers. Defendant is the owner of a farm of 55 acres . . . but he has not done any work worth mentioning upon his farm or elsewhere for a score of years. The father of plaintiff and defendant has been dead about 20 years. Defendant became more or less incapable during the lifetime of his father. After the father's death, defendant lived with and was cared for by his mother and brother John, and by John after the mother's death. About 1st July, 1896, John removed from Huntingdon, and Mrs. Wiggins, a sister, took charge of defendant. About the middle of April, 1898, an arrangement was made by Mrs. Wiggins for defendant, or by defendant himself, with plaintiff, that plaintiff would take defendant's farm and maintain defendant. It is not pretended that any promise by defendant to pay for his maintenance arises by implication, which as between strangers would arise. It is a case in which an agreement must be proved. . . . It is not suggested that plaintiff was either able or willing to take care of and maintain defendant without compensation, but it is alleged that there was the express bargain or arrangement between Mrs. Wiggins, with the approval of other members of the family, on the one side, and plaintiff on the other, that plaintiff should simply get the use of defendant's farm for the care and service rendered to defendant.

The case is not at all like or governed by *Redmond v. Redmond*, 27 U. C. R. 220, or *Iler v. Iler*, 9 O. R. 551, or similar cases.

Plaintiff says Mrs. Wiggins did propose that he should take defendant's farm and maintain defendant. Plaintiff was at first unwilling to take defendant at all. Afterwards, upon a full consideration of the matter, and after talking about it with his family, and after defendant came to plaintiff and said to plaintiff, "Go in and work the place and you will get your pay," plaintiff consented.

Defendant did not improve in health; he became more troublesome; the health of plaintiff's wife was menaced by the work put upon her; so about April, 1906, plaintiff took steps to have defendant placed in the Rockwood hospital for the insane, where he now is.

Plaintiff gave evidence that what he and his family did for defendant was worth \$1 a day, and he claims \$300 a year for the 8 years. Against that he is willing to credit \$50 a year for the use of the farm, which, according to the evidence of plaintiff and his witnesses, is only of the value of from \$1,200 to \$1,500.

I am of opinion that defendant had sufficient mental capacity, at the time of his going into plaintiff's family to reside, to know that he was to pay plaintiff for what plaintiff did. I think that defendant now knows that he was taken care of by plaintiff at his, defendant's, expense. Defendant was not imposed upon by anything plaintiff did. Plaintiff does not set up any hard and fast bargain as to amount. Plaintiff, if entitled, is entitled only to what is reasonable for the services rendered. Defendant was of weak mind, unable to take care of himself, but he was not a lunatic so found or declared in any proceeding. Plaintiff knew all about defendant, and could not be heard in any attempt to enforce any executory contract which was not for defendant's benefit. This case differs from cases cited in which the action was against a person in fact insane, but where plaintiff had no knowledge of, and no reason to suppose the existence of, insanity. Defendant was subject to insane delusions. . . . He was sane upon certain subjects; he had lucid intervals. I do not think defendant's delusions were sufficient to avoid a contract to pay what was reasonable for his maintenance. Labour and money were ex-

pended for protection of defendant's person and estate: see Pollock on Contracts, 7th ed., pp. 91, 92; Williams v. Wentworth, 5 Beav. 325; Jenkins v. Morris, 14 Ch. D. 674; Macdonald v. Grout, 16 Gr. 37.

Apart from the question of defendant's competency to contract, the facts seem to bring this case within the decision of *Re Rhodes*, 44 Ch. D. 94, to the extent at least of the proposition that "wherever necessities are supplied to a person who, by reason of disability, cannot himself contract, the law implies an obligation on the part of such a person to pay for such necessities out of his own property." But, if no competency to contract, or if competency and no contract, a further question presents itself. Defendant owned a farm; the income from it might be regarded as sufficient for his maintenance. If not in fact sufficient, was the deficiency provided in labour and food and raiment under circumstances from which an implied obligation would arise? . . . The care was a day-by-day service—an expenditure of time and money by plaintiff for defendant—which, I think, was necessary.

There is no way of computing or arriving at the value with anything like mathematical accuracy, but I think there is a way of doing so without injustice to defendant. I find that what plaintiff did was reasonably necessary, and no more than was reasonably necessary, for defendant's care—so plaintiff is entitled to recover in this action.

Plaintiff's statutory declaration furnished to the medical superintendent at Rockwood, to the effect that he, plaintiff, did what he did for defendant out of pity for him can hardly be urged against plaintiff. The declaration must be taken as a whole. Plaintiff claims in it \$1 a day, and I think plaintiff meant that he would not even for \$1 a day do what he did for defendant unless moved by pity so to do.

One dollar a day is an unreasonable amount, in the circumstances. The amount must in some way be considered according to defendant's means and station in life. The care of him was disagreeable work, no doubt, and it became increasingly so, but \$1 a day would soon absorb defendant's farm and put him upon the public. I think the supposed yearly value of defendant's property on 15th April, 1898, may be taken as a fair estimate of the amount to be paid to

plaintiff. Defendant's farm as a farm should be worth \$75 a year and taxes. The house as a residence, when plaintiff's care of defendant commenced, brought \$6 a month. . . . If the house could have been rented for \$72 a year, that together with \$75 for the farm, making in all \$147 a year, would be reasonable compensation to plaintiff. Care for 8 years at \$147 a year, \$1,176. Plaintiff must be charged with amount received from house rent, \$108, and 9 years' use of farm at \$75 a year, \$675, in all \$783, which, deducted from \$1,176, leaves \$393.

Judgment for plaintiff for \$393 with costs.

MACMAHON, J.

NOVEMBER 24TH, 1906.

TRIAL.

DART v. QUAID.

Promissory Note—Action on—Defence of Non Fecit—Consideration—Purchase Price of Horse—Finding as to Signatures—Knowledge of Nature of Document Signed—Agreement Admittedly Signed—Reference to Notes—Holder in Due Course.

Action on a promissory note for \$666 and interest, tried without a jury at Chatham.

L. J. Reycraft, Ridgetown, for plaintiff.

M. Wilson, K.C., and W. E. Gundy, Chatham, for defendant.

MACMAHON, J.:—The action is brought on a promissory note, of which the following is a copy: "Dunlop, January 31, 1905. On the 1st of April, 1906, for value received, I promise to pay R. Hamilton and John Hawthorne or order six hundred and sixty-six dollars (\$666.00), at the Bank of Commerce, Goderich, with interest at the rate of six per cent. per annum." This was signed by Robert Quaid, Burt Quaid, Albert Quaid, Fred Quaid, James Scott, and John Quaid, the defendants.

This note is the first of 3 promissory notes for an equal amount, signed by defendants, and said to represent the price of a Percheron stallion purchased from the payees of the note, through their agent, George H. L. Watterworth.

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Defendants plead non fecerunt; that plaintiff is not a holder for value; that defendant agreed to take shares in the horse then in possession of Watterworth as agent for Hamilton and Hawthorne, said shares as a matter of form being fixed at \$200 each, and that the horse was to be left in possession of defendant Robert Quaid, and the price was to be paid out of the earnings of the horse, 33 per cent. whereof each year was to be handed over to Hamilton & Hawthorne until the horse in that way paid for himself.

Hamilton & Hawthorne deposited in the Molsons Bank at Ridgetown the above notes and others aggregating \$60,000, being what are called syndicate notes or notes given by several persons who had joined in the purchase of stallions from them. Such of these as plaintiff wished to purchase were offered by Hamilton to him, and he made a selection of \$20,000 of the notes, for which he, on 21st September, 1905, paid \$17,850. He is a holder in due course.

Robert Quaid is a farmer . . . and defendants Burt, Albert, and Fred Quaid are his sons; John Quaid is his nephew; and James Scott is a farmer.

Robert, Burt, and Fred Quaid were examined for discovery on 29th September, 1906, and there was at that time an inclination on the part of each to deny his signature to the note. Robert said it looked like his signature; thought it was his signature; but he never signed a note, and what he did sign was a paper about 18 inches long, which Watterworth represented as an agreement whereby they were to have the use of the horse for 3 years, and were to give 33 per cent. of what the horse made during that time, when they were to become the owners of it. When asked if he signed more than one document, he answered: "I think we signed three of these agreements for one, two, and three years." When shewn the note, he said: "The writing part was not there, but whether I looked it over or not I can't say, but I was listening to him as I am to you now. He

(Watterworth) hands me the paper and he says, 'Put down your name there,' and I did." Question 45: "Was there no writing in the body of this (the note) when you signed it?" A. "No.

At the trial he said he saw a horse at the London Fair that Watterworth had, who asked him if he could not take a share in a horse, saying he would put one in the neighbourhood, and the horse would pay for himself out of what he would earn; that during the signing of the papers one of the boys asked if one of the papers was a note, and Watterworth replied, "No note about it;" and that Watterworth read over the agreement to them, and they signed three agreements—"We signed two agreements and an insurance policy." . . .

[The learned Judge here summarized the evidence of the other defendants, which was similar to that of Robert Quaid, and continued:]

I find that, after bargaining about the horse in Robert Quaid's house, the three notes were signed there by Robert Quaid and his three sons, and two days afterwards by John Quaid at his father's house, and by James Scott, who directed his son Robert to sign for him.

That night, after the notes were signed by Robert Quaid and his sons, Watterworth gave to Robert Quaid this guarantee: "Dunlop, Jan. 31st, 1905. For consideration of \$2,000 we hereby guarantee the Percheron stallion Munster (5332 h) to foal 50 per cent. of the mares bred to said stallion during the season of 1905, and with proper management if said stallion does not comply with said guarantee we hereby agree and bind ourselves to furnish another stallion of the same value. If said stallion is in as good health and as sound as when sold to the company at or on the premises of owners free of charge to them. Hamilton & Hawthorne." . . .

On 3rd February, 1905, on Watterworth's return to Robert Quaid's house, he gave him the following certificate, which Robert Quaid said he read over on the morning of the 4th: "Dunlop, February 3rd, 1905. This is to certify that Robert Quaid has purchased $2\frac{1}{2}$ shares of \$500 in the Percheron stallion Munster (5332 h) from Hamilton & Hawthorne, and settled for the same."

A like certificate for each of the following was left . . . at Robert Quaid's house; Robert B. Quaid (Burt), 2 shares, \$400; Thomas F. Quaid (Fred), 2 shares, \$400; James A. (Albert), 2½ shares, \$500.

A certificate was sent by Watterworth, dated 3rd February, from London . . . addressed to John Quaid . . .

A certificate was on the same day either sent to James Scott or left at Robert Quaid's for him, certifying that he had purchased one-half share at \$100.

The note sued on and the other two notes signed by defendants are all cut exactly the same size—8 inches wide by 4 inches deep—and evidently bound in a book with the counterfoils attached, and perforated to enable the blank notes to be readily detached. The bodies of the notes are in good clear type, the names of the payees, "R. Hamilton and John Hawthorne," being in capitals. The blanks for the place where made, the date when payable, the amount of the note, and the place where payable, are all filled in in large and extremely legible writing.

Defendants said that all the documents they signed were 18 inches long, while the three notes are 4 inches in length or depth, and were never any longer. If defendants, or any of them, had looked while signing, it was impossible that they should not have seen and recognized that what they were signing were promissory notes. If they did not look, they were guilty of negligence, and therefore liable to a holder in due course.

It strikes me that the story about not knowing that what they were signing were notes representing the price of the stallion, was an afterthought. They received the guarantee in which the price of the horse is mentioned as being \$2,000. Then the certificates left with or for the purchasers shew that the shares held by them amount in the aggregate to \$2,000.

On 8th February, 1905, Hamilton & Hawthorne wrote to Robert Quaid saying that they had been informed by Watterworth that he (Quaid) had purchased the stallion "Munster," and they considered that he had bought the best stock horse they imported last fall. Robert Quaid answered this letter on 21st February, saying he was well satisfied with the horse. He did not reply saying—as he

should have, were it the truth—"We did not purchase your stallion, but we entered into an agreement with Mr. Watterworth by which we are to have the stallion for 3 years, and he is to be paid for out of his earnings during that period."

At the trial Watterworth said that the agreement which defendants had sworn to as being signed by them he sent to Hamilton & Hawthorne. . . . The agreement is on a printed form, the blanks left being filled in with the class of horse, the name of the stallion, the pedigree number, and the price of the stallion, which is twice written and twice in figures.

This agreement, which is about 8 inches in length and 4 in width (across the width of the paper being printed the agreement, containing 15 lines, which could be read in half a minute), was, I find, signed by the 5 Quaid's who signed the note sued on, and also has the name of James Scott, which, I assume, is the signature made by himself at James Quaid's house.

The agreement is as follows: "For the purchase of a stallion horse to be held in Dunlop and surrounding towns and their vicinity, I hereby agree to pay the amount subscribed opposite my name for the Percheron stallion 'Munster' (5332 h) to be purchased from Hamilton & Hawthorne, Simcoe, Ont., providing two thousand dollars, \$2,000, is subscribed for, or otherwise this agreement shall be null and void, said amount of two thousand dollars (\$2,000) to be paid in 3 joint notes of equal amounts, payable in one, two, and three years from 1st April, 1905, with interest at the rate of 6 per cent. per annum, or to be paid in cash at the option of the subscribers on completion of this subscription list. Dated at Dunlop this 31st day of Jan., 1905."

The 6 names were signed below, and opposite each was placed an amount, \$500, \$400, or \$100, the six amounts aggregating \$2,000. . . .

I have no doubt that Watterworth said that the horse would easily pay for himself in 3 years, for he told the Quaid's they could say they had a stallion worth \$2,000, which would secure patronage where the owners of other and less priced stallions would fail. That is how the large revenue was to be derived from the stallion. But Watterworth denied making the statements sworn to, that no notes

were to be given, and that defendants were not to pay unless they got the money out of the stallion's service. I credit Watterworth's evidence because the contract signed by defendants supports it, the guarantee given by Watterworth in the name of his principals supports it, and the certificates left with or sent to defendants support it.

Each of the defendants signed 4 documents, and the agreement they did sign, and the only one they signed, is the one agreeing to purchase the stallion for \$2,000, and to give 3 promissory notes for the price. . . . And the certificates left and sent by Watterworth on 3rd February, 1905, correspond with the contract. . . .

These defendants are all intelligent farmers, and I cannot, in the face of the documentary evidence produced, credit the statements made by them that they signed these notes without knowing what they were signing. If they did sign without looking and knowing, they were grossly negligent, and *Foster v. Mackinnon*, L. R. 4 C. P. 704, and *Lewis v. Clay*, 14 Times L. R. 149, relied on by counsel for defendants, do not apply.

Judgment for plaintiff for \$666 with interest and costs.

NOVEMBER 24TH, 1906.

DIVISIONAL COURT.

SELKIRK GAS AND OIL CO. v. ERIE EVAPORATING
CO.

*Contract—Supply of Gas—Fixing Rate—Oral Agreement —
Conversations—Evidence.*

Appeal by plaintiffs from judgment of County Court of Haldimand in an action tried by the County Court Judge without a jury.

Plaintiffs were a company supplying natural gas. Defendants were about to start business within the field of operations of plaintiffs. One Grece was the manager of defendants, and had full authority to make a contract with plaintiff. One J. W. Holmes was the officer of plaintiffs

whose duty it was to make contracts with intending consumers of gas. And these two did make a contract for the supply of gas by plaintiffs to defendants for the season of 1905. So far the parties agreed.

This action was brought to recover 13 cents per thousand. The defendants alleged that the price agreed upon was 6 cents per thousand.

The County Court Judge found in favour of defendants, and plaintiffs appealed.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.

W. H. Blake, K.C., for plaintiffs.

W. T. Henderson, Brantford, for defendants.

RIDDELL, J. (after setting out the facts as above):—The one issue seems to be, what was the contract that immediately was made?

The learned Judge has found in favour of defendants, upon evidence which counsel for plaintiffs upon the appeal admits is consistent with his finding.

A reading of the evidence convinces me that no other decision could reasonably have been come to.

The facts are chronologically as follow. In May, 1905, Grece applies to plaintiffs for free gas. On 26th June a meeting of the directors of the plaintiffs is held at which a rate for gas, 13 cents per thousand, is fixed by the directors. At this meeting the owner of the business, the real defendant, is present. There is no pretence of any contract having been made at this meeting. On 7th August, 1905, Holmes tells Grece that he does not think Grece will get free gas by means of the subscription list that is being circulated to help defendants, but thinks it will cost him 6 cents, and possibly only 5 cents. No contract yet.

On 12th August, 1905, another meeting of the board of directors of plaintiffs is held, at which Grece is present, when a rate of 13 cents and 18 cents is spoken of, and Grece says to the board, "If gas is going to cost that, I can burn coal cheaper." He is then told that he could see Mr.

Holmes, and he would give him a rate that would not hurt him. No contract so far.

A few days later Grece meets Holmes, and this is his account of the interview and subsequent events: "A few days later I again met Mr. Holmes. I was alone, and asked, 'Is there anything further in regard to gas?' And he said: 'No, nothing more than I have told. I can't tell you exactly, but I will guarantee it will not cost more than 6 cents.' I said, 'If 6 cents is satisfactory to the company, I will use it.' Holmes said, 'It is all right, you needn't worry.' Nothing more said about the gas until the meter was read by Mr. Abrahart in the fore part of October. Mr. Holmes made connection ready for me, and I laid pipe and connected myself, and I began using gas about 23rd September, 1905."

This is the contract sued upon, and is the only contract anywhere alleged.

I cannot understand how there can be any doubt that such evidence amply justified—if, indeed, it did not compel—the learned Judge to find as he did.

Appeal dismissed with costs.

BRITTON, J., gave reasons in writing for the same conclusion.

FALCONBRIDGE, C.J., also concurred.

GARROW, J.A.

NOVEMBER 24TH, 1906.

C.A.—CHAMBERS.

CITY OF HAMILTON v. HAMILTON, GRIMSBY, AND
BEAMSVILLE R. W. CO.

*Court of Appeal—Leave to Appeal from Judgment at Trial—
Extension of Time—Mistake of Solicitor.*

Motion by defendants for leave to appeal directly to the Court of Appeal from the judgment at the trial with a jury

before MEREDITH, C.J., when damages were assessed against defendants at \$7,500, and to extend the time for appealing.

J. Dickson, Hamilton, for defendants.

W. A. H. Duff, Hamilton, for plaintiffs.

GARROW, J.A.—Without regard to the merits—the question being simply one of damages—I think leave should be granted. Judgment was delivered only on 11th October last, and within 30 days all the necessary steps to perfect an appeal to this Court were taken, if such an appeal had lain without consent and without leave, as was apparently the mistaken idea of defendants' solicitors. The amount is large. There was an undoubted right to go to the Divisional Court, or to come to this Court on consent or by leave. Defendants have satisfied me of their bona fide desire and intention to prosecute an appeal, and in the circumstances they should be relieved from the consequences of the mistake into which the solicitor fell in not observing that consent or leave was necessary. But they should of course pay the costs of this application and of the other proceedings taken by plaintiffs in consequence of the mistake, in any event of the action. Leave to appeal granted and time extended for 60 days from 11th October.

T H E
ONTARIO WEEKLY REPORTER

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CARTWRIGHT, MASTER.

NOVEMBER 26TH, 1906.

CHAMBERS.

MILLER v. BAYES.

*Venue—Motion to Change—Convenience—Expense — Speedy
Trial—Residence of Parties and Solicitors—Costs.*

Motion by plaintiff to change the venue from Sault Ste. Marie to North Bay.

W. N. Ferguson, for plaintiff.

W. E. Middleton, for defendant.

THE MASTER:—This case comes under Rule 529. (b). The facts, which are not in dispute, are as follows. The parties and their witnesses (with one or two exceptions) all reside at Webbwood . . . a station on the Canadian Pacific Railway distant from Sault Ste. Marie 131 miles and from North Bay 127 miles. The train facilities are about equal to either town. It is said that defendant has one witness who lives at Massey, which is a little nearer to Sault Ste. Marie than to North Bay. The number of witnesses is not given by either party. The only thing else to remark is that, contrary to the rule, the affidavit on defendant's behalf is made by the solicitor and not by the client: see *Leach v. Bruce*, 9 O. L. R. 380, 4 O. W. R. 491. It also states that the sheriff or his deputy from Sault Ste. Marie will be a necessary witness and will have to come nearly 26 miles. This would cost about \$20.

The ground on which plaintiff relies is that if the venue is changed the action can be tried at the ensuing non-jury sittings at North Bay which begin on 10th December next. If the ordinary time is chosen for the next sittings at Sault Ste. Marie, it will not be held before the early part of June.

Now, in the present case we have it admitted that the solicitors of both parties live at Sudbury, which is nearly 50 miles nearer to North Bay than to Sault Ste. Marie. There will be no difference in expense, except in regard to the sheriff. . . .

In these circumstances, I think the order should properly be made, following *Mercer Co. v. Massey-Harris Co.*, 16 P. R. 171, which is a case very similar in its facts. The fact of an earlier trial was considered a reason of weight by the Chancellor in *McArthur v. Michigan Central R. W. Co.*, 15 P. R. 77,79. . . .

[Reference also to *Servos v. Servos*, 11 P. R. 135.]

It is not stated what the sheriff is to prove. Perhaps plaintiff can safely make such admissions as will render his attendance unnecessary. If this cannot be done, then the extra expense of the trial at North Bay (if any) will be costs to defendant in any event.

The costs of the motion will be in the cause as usual.

MAGEE, J.

NOVEMBER 26TH, 1906.

WEEKLY COURT.

McFARLAN v. GREENOCK SCHOOL TRUSTEES.

Public Schools — Change in School Site — Expenditure of Money — Special Meeting of Ratepayers — Taking Poll — Right of Farmers' Sons to Vote — Public Schools Act — Injunction — Motion for Judgment.

Motion for an interim injunction.

G. H. Kilmer, for plaintiff.

A. W. Ballantyne, for defendants.

MAGEE, J.:—The injunction is asked upon the ground that the special meeting of ratepayers called by the trustees

to consider the new school site selected by them, decided against its adoption, and that meeting having so decided there was no power to hold a poll, and that at the polling the adoption was carried by reason of persons entered on the assessment roll only as "farmers' sons" being allowed to vote in its favour.

The present Public Schools Act is ch. 39 of the statutes of 1901 (1 Edw. VII. ch. 39), which has not been amended in any respect affecting this question.

The difficulty arises over the use of the word "ratepayer" in the 24th section as to changing site, and its definition in sec. 2, which does not include "farmers' sons," and the fact that by sec. 13 not only every ratepayer, but "every person qualified to vote as a farmer's son under the Municipal Act," is entitled to vote at any election for school trustee or on any school question whatever. The plaintiff urges that only ratepayers as defined in sec. 2 are entitled to be heard under sec. 34. The defendants say that under sec. 13 and sub-sec. 4 of sec. 15 the votes of farmers' sons were properly received.

The present Act is in these respects the same as the Public Schools Act of 1896 (59 Vict. ch. 70), which consolidated the Public Schools Act to that date. In the previous consolidating Act of 1891 (54 Vict. ch. 55) no such difficulty arose. "Ratepayer" was there defined as at present, but there was no provision as to farmers' sons: see secs. 2, 15, 16, 22, 64, 66. The Act of 1896 introduced the provision enabling "farmers' sons" to vote, and altered the form of declaration required to be made by a voter at the poll so that it could be made by that class, and also qualified them if resident to be trustees: see secs. 2, 9, 14, 31. It would thus seem as if their qualification to vote or to be a trustee was an innovation in 1896. But going back to the Public Schools Act in the Revised Statutes of 1887, ch. 225, in sec. 2 the word "ratepayer" was at that time defined as including "any person entered on the assessment roll as a farmer's son," and in sec. 21 the voter could declare himself qualified as a farmer's son. The Act of 1896 was therefore merely a return to the policy of allowing that class to vote which had been omitted or discarded in 1891.

The words used in sec. 13 of the present Act are very broad, and give the right to vote "at any election for school

trustee or on any school question whatsoever." But for the plaintiff it is urged that sec. 34 of the present Act deals with a specific matter, and the specific course therein pointed out should be followed, and that the word "ratepayer" used should only have the meaning expressly given to it by sec. 2, and especially as it deals with a question of important outlay, the burden of which will fall on that class. Without considering whether the franchise was not conferred on them because they do in fact bear the incidence of taxation, though not property owners, a reference to that section of the Act may enable us to get at the intention of the legislature.

Although the right of voting is conferred on "farmers' sons," they are not mentioned in the Act anywhere but in secs. 13 and 15. Elsewhere the reference is only to "ratepayers," and, although farmers' sons are expressly given the right to vote at elections of trustees, yet sec. 14 only directs a meeting of ratepayers for such an election, and sec. 15 directs the secretary to enter in the poll book the names of the "ratepayers" offering to vote. To hold that because only the word "ratepayers" is used, the intention expressed in sec. 13 shall not be given effect to, would manifestly carry us too far and render that section wholly nugatory. If then in sec. 15, sub-sec. 2, the word "ratepayers" does not exclude farmers' sons, it will require some other argument to make it so restrictive in sec. 34.

Section 2 only defines the meaning of the word "ratepayer," "unless a contrary intention appears." In my view, a contrary intention does appear where the word is used in relation to those who have the right to vote, and there it must be taken to include all, or rather not to exclude any, having such right. It may not be necessary to give the same interpretation to it where it is not a matter of voting, but only a matter of requirement or demand, as, for instance, petitioning for union of school sections, calling a meeting of ratepayers, or requiring the calling of a meeting of trustees, or perhaps demanding a poll.

A narrower construction of sec. 34 is perhaps also open, which does not any more accord with the plaintiff's view. The trustees are to call a special meeting of the ratepayers. If at such meeting school questions are to be voted on, and farmers' sons have the right to vote on all such questions,

they must be at liberty to attend the meeting. It is not necessary for the trustees to call a meeting of ratepayers and farmers' sons. The meeting of ratepayers being called, under the Act the farmers' sons have the right to be present and are bound by the notice. Then the meeting being so called, no change of school site shall be made without the consent of "the meeting," that is, of those authorized to attend it.

In the rural school sections it is apparently the intention of the legislature that questions shall be disposed of as quickly and with as little inconvenience to those who are interested as possible. Section 15 allows a poll to be demanded by any two ratepayers at any meeting for the election of trustees or the settlement of any school question, and the poll is to be forthwith granted by the chairman, and apparently proceeded with at once, and the chairman and secretary are to count up the votes and announce the result. If the question submitted be adopted, the chairman so declares it, and in case of a tie he gives the casting vote. The voting is apparently part of the meeting as much so as voting at a meeting of shareholders of a company, and intended to go on at once when the poll is granted. The annual meetings commence at 10 a.m. (sec. 14), and the poll closes at 4 p.m. (sec. 15), and a copy of the minutes and of the poll book must be sent to the inspector.

If farmers' sons are to be given the right to vote on all school questions, they must have the right to attend the meetings, whether there is a poll or not, for voting need not be by a poll unless demanded (sec. 15 (1)), and it is the consent of the majority of the meeting which is required.

But then it is said that the provisions of sec. 15 as to a poll do not apply to a question of change of school site under sec. 34, but only to the annual meetings referred to in sec. 14. It is urged in behalf of this contention that under sec. 15 there must be a chairman to grant a poll and announce the result, and a secretary to prepare the poll book and enter the votes, and that it is only in sec. 14 that a chairman and secretary are spoken of. But sec. 15 expressly refers to any meeting, and sub-sec. 3 of sec. 14 authorizes a chairman and secretary "at any school meeting." In the Act of 1891 that sub-section was a separate section (sec. 19), and the mere re-arrangement does not

afford sufficient reason to restrict the meaning of the words employed.

It is also argued that, as sec. 34 requires the appointment of arbitrators "then and there," it cannot be intended that there should be a poll. But the fact that the polling is part of the meeting is a sufficient answer to that objection, though indeed it implies that the voters shall remain till the close of the poll so as to take part, if necessary, in choosing an arbitrator.

Another objection to the poll was that it was granted on the demand of two persons, one of whom, William Alexander, was a farmer's son, and not a ratepayer. It is said on the other side that he is a ratepayer. The only documentary evidence offered is not conclusive. Whether he comes within the definition of ratepayer in sec. 2 makes, I think, no difference. It appears from the affidavit of Robert Russell, filed on behalf of the plaintiff, that the poll was granted by the chairman on a show of hands, so that apparently the chairman did not act only upon the demand made by two persons, but also upon the desire of the majority of the meeting. No objection upon this score was made at the time, nor any objection made to the inspector within 20 days, as prescribed by sec. 15.

As I consider that the poll was proper and a part of the special meeting, and that farmers' sons were entitled to vote, the plaintiff's objections to the result of the vote fail, and I am unable to grant the injunction on the grounds on which it was asked, against the change of site or removal or completion of the school. . . .

I refuse the motion, with costs in the cause to defendants, unless the trial Judge otherwise directs. I may say that I have dealt with the matter as I have because it was practically a question of construction of the statute, on which the evidence at the trial could throw no additional light. If the parties desire it may be turned into a motion for judgment.

The parties consenting that the motion for injunction herein be turned into a motion for judgment, the action is dismissed with costs (including the costs of the motion for injunction), for the reasons given for the refusal of the injunction asked for.

NOVEMBER 26TH, 1906.

DIVISIONAL COURT.

RE WILSON AND TORONTO GENERAL TRUSTS
CORPORATION.

*Surrogate Court — Jurisdiction — Reopening Order Made on
Passing Executors' Accounts — Fraud or Mistake — Con.
Rule 642 not Applicable — Inherent Jurisdiction — Ecclesi-
astical Courts — Statutory Courts — Surrogate Judge —
Persona Designata — Courts of Record.*

Appeal by the widow of Sir Adam Wilson from an order of the Judge of the Surrogate Court of the County of York, made in the following circumstances.

The Toronto General Trusts Corporation, as successors of the Trusts Corporation of Ontario, were the executors of the will of Sir Adam Wilson, deceased, bearing date 22nd June, 1891, and letters probate of the will were granted to the corporation on 15th February, 1892.

An application having been made to the Surrogate Judge by the executors for the auditing and passing of their accounts, and for fixing the compensation to be allowed them for their care, pains, and trouble, and time expended in or about the estate, and the Surrogate Judge having audited and passed the accounts, and fixed the compensation to the executors, in the presence of counsel for the appellant (the widow), on 3rd January, 1905, an order was made by which it was found: (1) that the total amount which had come into the hands of the executors down to and including 30th June, 1903, was \$95,890.34; (2) that the total amount of the revenue from the estate which had come to the hands of the executors to the same date was \$42,630.43; (3) that the executors had properly paid out and disbursed to the same date out of capital \$21,189.63, and out of revenue \$86,329.93 in due course of administration, and that the balance in their hands on the same date was \$31,001.21; (4) that down to the same date the executors had made investments out of capital on mortgages on real estate and stock, and that on the same date there was outstanding on these investments \$24,306.67; (5) that the assets

of the estate on 30th June, 1903, were those set out in a schedule to the order.

The compensation to the executors was fixed by the order at \$6,890, which sum, together with the costs of auditing and passing the accounts and fixing the compensation was directed to be allowed and paid out of capital, and, after deducting these amounts, the amount remaining in the hands of the executors was found to be \$23,952.41.

On 7th February, 1906, the appellant (the widow) presented to the Judge of the Surrogate Court a petition in which she alleged that she had recently for the first time been informed "that an item of \$1,200 was charged against the trust estate in these accounts as of 14th August, 1897, for the purchase of stock in the Scramble Gold Mining Company;" that she had no knowledge of the purchase, and never authorized it; that the stock is of no value; that no certificate for the stock is held by the executors; and that the register of the company shews that no stock was ever issued to the estate of the testator or to her; and that this sum of \$1,200 was debited against the estate by the executors in fraud of the estate and of the petitioner.

It was further alleged in the petition that the executors had used money of the estate and lent it and received interest on it to a much larger amount than they had credited the estate with, and had made a profit out of their trust which the estate had not received or been credited with; that the executors had from time to time charged the estate with interest on overdrawn balances at a much higher rate than that at which they had obtained the money, and had taken to their own use and benefit the difference between the lower and the higher rate of interest; that in the inventory there appeared an item shewing as an asset a mortgage from one J. Thompson for \$1,000, which did not appear to be accounted for in the accounts filed in the Surrogate Court; that among the assets of the estate which came to the hands of the executors was a mortgage from one Brock for \$37,400, covering about 210 lots; that nearly all the lots, including all the best locations, had been sold by the executors, and yet that the indebtedness on the mortgage still stood at \$40,000; that the executors, without consulting the petitioner, had sold a residence and lands belonging to the estate, worth upwards of \$10,000, for \$5,000; that the estate

had been grossly mismanaged by the executors, and that this mismanagement should have been taken into consideration had the attention of the Court been directed thereto when fixing the compensation; that the executors had received moneys by way of commission or rebates from insurance and estate agents, and had kept them for their own use; that large and excessive sums were spent by the executors in necessary and expensive litigation, unauthorized by the petitioner, and that these sums had been charged to the estate; that the petitioner was not notified of the proceedings before the Surrogate Judge, and was not present or represented thereat, and the solicitor for the executors wrongfully assumed to represent her.

The prayer of the petition was that the order of 5th January, 1905, should be set aside and the accounts reopened and further investigated by the Surrogate Court, without reference to the order.

After a protracted and expensive inquiry before the Surrogate Judge, he made an order on 11th June, 1906, giving leave to the petitioner, upon the next passing of the accounts of the respondents, to charge them with \$48.87, "being the sum of \$30 in respect of the purchase of Scramble Gold Mining Company's stock," with interest thereon, and \$32 for commission or rebates received by the respondents in respect of insurance on properties belonging to the estate, with \$8 for interest on that sum, and dismissed the petition with costs to be taxed as between solicitor and client and paid by the petitioner to the respondents.

The appeal was from that order.

F. E. Hodgins, K.C., and D. T. Symons, for the petitioner, appellant.

G. F. Shepley, K.C., and J. H. Moss, for the respondents, objected that there was no jurisdiction in the Surrogate Judge to vacate his order of 5th January, 1903, or to re-open the accounts.

The argument was confined to the objection, the argument upon the merits being postponed.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., ANGLIN, J.), was delivered by

MEREDITH, C.J.:—The jurisdiction of the Surrogate Court was rested by counsel for the appellant upon two propositions: (1) that there is inherent jurisdiction in every Court to vacate an order which has been made by mistake or has been procured by the fraud of the party who has obtained it; (2) that Con. Rule 642 applies to the Surrogate Court, and gives the jurisdiction to the Surrogate Court, if it has not inherent jurisdiction.

Dealing first with the second proposition, I am of opinion that Con. Rule 642 cannot be invoked to support the jurisdiction of the Surrogate Court. . . .

The Rule is taken from Order 330 of the General Orders of the Court of Chancery of 1868, and that Order was substantially a re-enactment of secs. 17 and 18 of Order 9 of the General Orders of 1853. By this latter Order bills of review, bills in the nature of bills of review, bills to impeach decrees on the ground of fraud, bills to suspend the operation of decrees, and bills to carry decrees into operation, were abolished, and for the bill of review was substituted a rehearing of the cause, and for the other bills the proceeding by petition which is now provided for by Con. Rule 642.

The Con. Rule must, I think, be treated as substituting the proceeding by petition for the practice of filing such bills as were abolished by the General Order of 1853, and must, therefore, be confined to cases in which, under the former practice, such relief as is mentioned in the Con. Rule could be obtained by one or other of such bills.

So interpreting the Con. Rule, it can have no application to such a case as that to which the appellant seeks to apply it—the setting aside of an order of the Surrogate Court made on passing the accounts of an executor. . . .

I am, however, of opinion that the Surrogate Judge, acting as the Surrogate Court, has inherent jurisdiction to set aside an order which he has been induced to make by the fraud of the party who has obtained it, and also to set aside or vary an order which he has made by mistake, though not, however, to correct errors which he has made in the judicial determination of any question upon which he has actually passed.

That "the Surrogate Courts of the province are invested with the authority and jurisdiction over executors and administrators and the rendering by them of inventories and accounts conferred in England on the Ordinary under 21 Hen. VIII. ch. 5, except in so far as the same may have been revoked by subsequent legislation or Rules, was held by the Court of Appeal in *Cunnington v. Cunningham*, 2 O. L. R. 511, 518, and by Divisional Court in *In re Russell*, 8 O. L. R. 481, 3 O. W. R. 926.

It is open to question whether this authority and jurisdiction was derived from the statute of Henry or was possessed and exercised by the Ecclesiastical Courts in England long before that enactment: see *Telford v. Morrison*, 2 Ad-dams 319. But, however that may be, the result is the same as to the Surrogate Courts of this province.

No question such as arose in *In re Russell* was presented on the passing of the accounts of the respondents, for no attempt was then or is now made by the appellant to charge the respondents with assets that were not included in the inventory brought into the Surrogate Court by them, the contest being as to the administration of assets which are admitted by the respondents to have come to their hands.

It is, I think, clear therefore that the Surrogate Judge had jurisdiction, in dealing with the accounts brought in by the respondents, to inquire into and determine all of the matters and questions which are dealt with in the appellant's petition to re-open the accounts, had they been raised before him at that time.

It is also, I think, clear that the acts of the Surrogate Judge in passing the accounts were those of the Court, and not of the Judge as *persona designata*. In *Cunnington v. Cunningham*, in *In re Russell*, and in *In re Williams*, 31 O. R. 406, they were so treated.

The accounts to be dealt with are spoken of in sec. 72 of the Surrogate Courts Act as accounts filed in the Surrogate Court, and the approval of the Judge referred to in the section must mean, I think, the approval of the Judge sitting as the Court, that is, of the Court. . . .

That the Surrogate Courts are not statutory courts having only those powers which are in terms conferred upon them by the Surrogate Courts Act, follows, I think, from

. . . Grant v. Great Western R. W. Co., 7 C. P. 438,
and . . . Cunningham v. Cunningham. . . .

There remains to be considered the question whether the Ecclesiastical Courts had jurisdiction and authority to grant such relief as was sought by the appellant in the Surrogate Court. . . .

[Reference to Harrison v. Mitchell, Fitzgibbon 303; In re Brick's Estate, 15 Abbott P. R. 12; Sipperly v. Baucus, 24 N. Y. 46.]

In In re Brick's Estate, at p. 36, Mr. Justice Daly says: "I have pointed out, so far as it is shewn by the authority of adjudged cases, the extent to which these Courts have exercised this limited power, and the whole may be summed up briefly in the statement that they may undo what has been done through fraud or upon the supposition that they had jurisdiction . . . or correct mistakes, the result of oversight or accident. . . . These are all powers existing of necessity and indispensable to the administration of justice, under which may be embraced any other exercise of jurisdiction of a like nature or character." . . .

It is further to be observed that the Surrogate Courts of this province are courts of record (R. S. O. 1897 ch. 59, sec. 3), and therefore possess the broad general powers to review and correct their proceedings spoken of by Mr. Justice Daly as being possessed by courts of record, which is an additional reason for holding that the Surrogate Courts are possessed of the authority and jurisdiction which I would attribute to them.

The preliminary objection must, therefore, in my opinion, be overruled; but I must not be understood as determining that all or any of the matters referred to in the petition disclose a case for the exercise by the Surrogate Court of the authority and jurisdiction which, in my opinion, were vested in it.

I refer also to Gibson v. Gardner, 7 O. W. R. 474, 8 O. W. R. 526, and to Prudham v. Phillips, referred to in a note to the Duchess of Kingston's case, 20 How. St. Tr. 355, 479.

CARTWRIGHT, MASTER.

NOVEMBER 27TH, 1906.

CHAMBERS.

VAN KOUGHNET v. TORONTO TOWEL SUPPLY CO.

*Discovery—Examination of Servant of Defendant—Con.
Rules 439 (a), 440, 441.*

Motion by plaintiff for an order allowing him to examine for discovery, "in place of and on behalf of defendant," one Cowan, a servant of defendant, whose real name was Harvey C. Wheeler, and who resided in Boston, U.S.A., but carried on business in Toronto under the name of the Toronto Towel Supply Co. The statement of claim alleged that plaintiff was injured by a collision with a horse and waggon of defendant, driven by Cowan.

F. J. Roche, for plaintiff.

J. A. McEvoy, for defendant.

THE MASTER:—No authority was cited for the motion. Rules 439 (a), 440, and 441, are the only ones which allow the examination for discovery of any other person than a litigant. Cowan does not come under any of them.

So strictly are the Rules construed that where a defendant resides abroad he can only be examined on commission: see *Lefurgey v. Great West Land Co.*, 7 O. W. R. 738. In the case of a foreign corporation, no such examination can be had: see *Perrins v. Algoma Tube Co.*, 8 O. L. R. 634, 4 O. W. R. 289.

Motion dismissed; costs to defendant in the cause.

CARTWRIGHT, MASTER.

NOVEMBER 28TH, 1906.

CHAMBERS.

CANADIAN GENERAL ELECTRIC CO. v. KEYSTONE
CONSTRUCTION CO.

Costs—Motion for Better Affidavit on Production of Documents — Production of Document Sought — Costs of Motion.

Motion by plaintiffs for an order requiring defendants to file a further affidavit on production of documents.

G. F. McFarland, for plaintiffs.

J. E. Jones, for defendants.

THE MASTER:—Plaintiffs claim damages for a breach of contract. Defendants allege, among other defences, that they were induced into the contract by plaintiffs' representations that their plan was "the most economical and effective electric lay-out known to modern engineering, and at the lowest possible cost," and that, on finding both these assertions to be untrue, they repudiated and cancelled their contract with plaintiffs.

The president of the defendant company was examined on 4th October. It was admitted that a contract had been made by defendants with another company. The president had not that contract with him, but agreed to leave it with defendants' solicitors, so that plaintiffs could see it. This was not done promptly, and on 3rd November plaintiffs' solicitors wrote asking for its production. On 6th November defendants' solicitors replied that they would "endeavour to procure it and let you have it as soon as we can obtain it."

Plaintiffs were anxious to go to trial at the present non-jury sittings at Toronto, and on 23rd November served notice of the present motion. . . . On the day following the contract had reached defendants' solicitors, before the receipt by them of the notice of motion. The contract was, therefore, in the hands of plaintiffs' solicitors before the return of the motion; so that the only question for decision is as to the proper disposition of the costs.

As to this neither side was prepared to make any concession. . . . Defendants' contention was that the contract was not relevant to the issue, and that production was only given of grace and not as of right. This I cannot agree with. The allegation in the statement of defence above mentioned makes it important for plaintiffs to see if the price to be paid thereunder by defendants is less than it was to have been under their contract. Then, in the circumstances, it cannot be said that the motion was precipitate, when over two weeks had gone by without any word from the other side, and when the sittings was drawing to a close.

The costs cannot be given to defendants unless it can be said that the motion was vexatious and inexcusable. This cannot be truly said, though it might have been better to have given a day's or two days' notice before moving.

Looking at it now from the other side, can it be said that the costs should be to plaintiffs in any event. This is the extreme measure of what is usually given on Chambers motions, and is the penalty of, so to say, contumacious or unexplained default, or if some glaring and inexcusable irregularity. Neither of these charges can be made against defendants. It would seem that the solicitors had been practising on easy terms, and this is not to be discouraged by imposing penalties whenever any little slip or oversight takes place.

Viewing this matter under all the circumstances, I think the proper disposition of the motion will be to dismiss it without costs to either party.

MEREDITH, C.J.

NOVEMBER 29TH, 1906.

CHAMBERS.

RE GOODERHAM.

Administrator pendente Lite—Powers of High Court and Surrogate Court as to Appointment of — Removal of Cause from Surrogate Court into High Court.

Motion by the persons named in what was propounded in the Surrogate Court of the County of York as the will of Sarah K. Gooderham, and which was contested by the respondent, to remove the contestation into the High Court, and for the appointment of an administrator of the estate pendente lite.

W. H. Blake, K.C., for the applicants.

H. E. Rose, for the respondent.

MEREDITH, C.J.:—A case is made out for the removal of the cause into the High Court, and an order may go for its removal, but an administrator pendente lite cannot be appointed upon this application. The only authority which the Court has to appoint an administrator pendente lite is that conferred upon it by the Surrogate Courts Act; sec. 56 of which, as interpreted by the Court of Appeal in Beatty

v. Haldan, 4 A. R. 239, gives jurisdiction to the High Court, where an action is pending in it touching the validity of the will of any deceased person, to appoint such an administrator; and it may be that, by force of sec. 35, where a cause is removed into the High Court under sec. 34, the Court has the same jurisdiction vested in it. Such an order should not, however, be made until the cause has been removed into the High Court. In Beatty v. Haldan the order was made in an action instituted in the High Court, and in Bergin v. Leclair (not reported) an action had been instituted in the High Court, and the questions raised in the Surrogate Court were directed to be tried in that action.

Order made removing matter into High Court.

MAGEE, J.

NOVEMBER 29TH, 1906.

WEEKLY COURT.

MURPHY v. BRODIE.

Costs—Mortgage Action—Executors—Trustee—Redemption—Set-off.

Hearing on further directions and as to costs.

F. E. Hodgins, K.C., for plaintiff.

W. H. Blake, K.C., for defendants.

MAGEE, J.:—This action was a consolidation of two actions, the first brought by the late Margaret Stuart against John L. Murphy, and the second by John L. Murphy against Hugh Brodie.

In the consolidated action Mr. Murphy claimed repayment by defendant Brodie and the executor of Margaret Stuart's will of \$2,123.27, paid by him on a mortgage and judgment in favour of J. T. McLaughlin, and also claimed against the executor \$314 due by Mrs. Stuart to him for rent, taxes, etc. By counterclaim the executor alleged that the mortgage to McLaughlin for \$2,900 and the mortgage to Mrs. Murphy for \$600, were each for too large a sum, and

included unreasonable interest and bonus to the mortgagees, and that the former improperly included \$200 for professional charges and disbursements of plaintiff, and that plaintiff had omitted to apply the rents and profits in reduction of the interest on the mortgagees, and the counterclaim asked that plaintiff be ordered to convey the land to the executor on payment of the amount properly due on the mortgages.

At the trial the action was, as against defendant Brodie, dismissed with costs; the mortgages to McLaughlin and Mrs. Murphy were declared to be securities for only \$700 and \$500 respectively, with interest, thus striking out large bonuses allowed the mortgagees by plaintiff; and accounts were directed; and on payment to plaintiff of any amount found due him a conveyance to defendant was ordered; and further directions and costs were reserved.

After the trial the property was sold by plaintiff, with the consent of all parties, and \$3,183.79 received therefrom by plaintiff. It is by reason of this amount that the Master reports a balance of \$719.85 owing from him. But for that sale there would have been a large sum due to plaintiff.

The report shews that at the date of the issue of the writ of summons in *Stuart v. Murphy*, 22nd October, 1901, \$340.29 was owing to plaintiff Murphy, besides his account for professional services and disbursements, which was only reduced by taxation from \$200 to \$197.62. This would be in addition to the sum of \$300 and interest owing to Mr. Brodie, for whom plaintiff was to that extent trustee.

On 2nd May, 1902, when the original action of *Murphy v. Brodie* was commenced, there was owing to plaintiff \$778.88 additional, of which \$727.12 was principal and interest allowed as properly paid on the McLaughlin mortgage.

At the time of the order for consolidation there was a further sum of \$133.97 due to him.

All these sums were irrespective of any moneys due from Mrs. Stuart for rent, taxes, etc., which indeed, if paid to plaintiff, would have gone to reduce his claim. Owing to the sale it was not by the parties considered necessary for the Master to inquire or report as to those. As the action was dismissed as against defendant Brodie, plaintiff

should not, as against the executor, have any costs of the original action of *Murphy v. Brodie* before or of the consolidation order.

In the original action, *Stuart v. Murphy*, there was alleged against the defendant therein improper conduct in taking the deed in his own name, and also in mortgaging and making repairs and improvements. Apart from that, it was an action for redemption in effect, but without tender or offer of payment. Those charges were only sustained by the reduction of the amounts of two mortgages. The reductions were, however, substantial, and the arrangements which rendered them necessary were spoken of as extraordinary by the learned Chief Justice who tried the consolidated action. In view of those arrangements, Mr. Murphy should not be allowed costs before or of the consolidation order in *Stuart v. Murphy*, nor should the estate of Mrs. Stuart, in view of the claim she put forward.

Since the consolidation the action has practically been, as against the executor, a mortgagee's action, in which the mortgagee has recovered the larger portion of his claim, and was not at the trial deprived of costs.

Plaintiff Murphy should have his costs after the consolidation order down to and including the trial judgment, except in so far as the same were increased by the attempt to support the disallowed claims on the two mortgages. The executor should have his costs down to and including the trial, in so far as the costs of defence were increased by the resistance to those disallowed claims.

Plaintiff should also have the costs of the reference and the subsequent costs of the action. I assume that the Master has dealt with the expenses of sale.

The amount \$719.85 found by the Master as being in plaintiff's hands, it has been agreed by the parties, shall be reduced by \$25, leaving \$694.85. He is, so far as is shewn, still trustee for defendant Brodie to the extent of \$300 and interest. The exact amount does not appear, but counsel can probably agree upon it. If not, it may be necessary to have proof or inquiry.

Plaintiff's costs on the basis stated will be taxed and those of the executor to the extent mentioned, and the latter set off pro tanto against the former. The difference between the excess of plaintiff's costs and the above sum of

\$694.85 shall, if in favour of plaintiff, be payable to him by the defendant executor forthwith after the taxation, and to be levied de bonis et terris testatoris et si non de bonis propriis.

If the difference be against plaintiff, he shall be liable to pay the same, with interest from the date of the report to be calculated at 5 per cent. per annum, unless to the satisfaction of the registrar it is shewn that the \$694.85 or a greater portion of the proceeds of sale have been set apart on special deposit in a chartered bank at interest, or otherwise set apart by agreement of the parties, and in such case at the rate of interest actually earned, as fixed by the registrar. The amount shall be payable by plaintiff to defendant Brodie to the extent of the amount due him, and any surplus shall be payable to the executor. If there be not enough to pay defendant Brodie, it may be necessary to make inquiry as to the rents, taxes, etc., due by Mrs. Stuart, and it may be spoken to.

The judgment should be without prejudice to any rights of defendant Brodie against his co-defendant or Mrs. Stuart's estate, if he be not paid in full.

MULOCK, C.J.

NOVEMBER 29TH, 1906.

WEEKLY COURT.

RE ROBINSON AND VILLAGE OF BEAMSVILLE.

Municipal Corporations—Local Option By-law—Motion to Quash—Technical Objections — Substantial Compliance with Statute—Delay in Moving—Discretion—Refusal to Quash.

Motion by Robinson to quash a local option by-law passed by the council of the village of Beamsville on 27th February, 1906.

C. H. Pettit, Grimsby, for applicant.

A. Mills and W. E. Raney, for the village corporation.

MULOCK, C.J.:—Various objections are taken to the validity of the law. It was contended that there was dis-

regard of many of the preliminary steps required by the statute, both in connection with the publication of the by-law and the voting thereon. It was conceded by the applicant that it could not be shewn that the irregularities complained of affected the result. The voting took place on 19th February; the by-law was carried by a majority of 6, 109 voting for and 103 against it.

At the Bar it was stated that the population of Beamsville was between 800 and 900. As to the objection that the by-law was insufficiently advertised, it is impossible to suppose that in a small and compact community like the village in question, the fact that the voting was to take place at the appointed time was not fully known to the electorate. The fact of 212 votes in all having been cast establishes this point clearly. It is said that there were in all 293 names on the voters' list, but many of these would doubtless represent absentees, or persons whose names appeared more than once on the lists. The actual total vote cast is a large number out of a total population under 900. Without expressing any opinion as to whether the publication was had in strict compliance with the statutory requirements, it was evidently sufficient to accomplish the object of the Act, namely, to give the electorate due notice of the pending election. The by-law was passed by the council on 27th February, 1906. The minutes shew that it was passed on 22nd February, but I am satisfied from the evidence that the entry of this by-law on the minutes of 22nd February, instead of 27th February, was an error on the part of the clerk.

No steps were taken to quash the by-law until 8th October, and no satisfactory explanation of the delay is forthcoming. The by-law on its face is good, the objections to its validity having reference to matters outside of the by-law. In such a case it is discretionary with the Court to exercise its authority to quash a by-law on summary application: *Re Bolton and Town of Peterborough*, 16 U. C. R. 389.

The by-law was carried by a majority of 6, and there does not appear to have been an intentional disregard of the formalities required to be observed by the municipality in connection with such voting. On the contrary, the voting appears to have been conducted in accordance with the

principles laid down in the Municipal Act, and the result does not appear to have been affected by any disregard of formalities called for by the Act.

In the course of an able argument Mr. Pettit, for the petitioner, admitted that, on account of the long interval between the time of voting and preparing the material in connection with this application, it was difficult to obtain satisfactory evidence on many matters, the subject of his objections. If prompt action had been taken, this difficulty would not have arisen.

Where a by-law of this nature has engaged the attention of a municipality, and been duly carried and gone into effect, a motion to quash should be promptly made. It is not in the public interest that uncertainty as to conditions affecting the liquor traffic should exist for any considerable period of time. In this instance for nearly 8 months no attack was made upon the by-law; then this motion was launched, and now, for the first time, is argued. Should the by-law be set aside on a technicality, it might be impossible to have another submitted to the electors at the approaching municipal elections, which would not have been the case had the petitioner acted with greater promptitude. No one having for nearly 8 months moved against the by-law, it may be assumed that there is no strong public opinion against it. On account of this delay, the Court should, I think, decline to consider any of the objections in question, none of which, so far as I see, are meritorious, and refuse to quash the by-law, which is legal on its face.

This motion should be dismissed with costs.

MABEE, J.

NOVEMBER 29TH, 1906.

TRIAL.

ANDERSON v. ROSS.

*Covenant—Restraint of Trade—Termination of Partnership—
Covenant not to Carry on Similar Business — Carrying
on Business as Agent or Manager for Another.*

Action for a partnership account. Counterclaim for damages for breach of a covenant in the partnership articles.

F. H. Keefer, Port Arthur, for plaintiff.

H. Cassels, K.C., and W. F. Langworthy, Port Arthur, for defendant.

MABEE, J.:—The parties agreed at the trial upon a referee who was to take the accounts of the partnership, and consent minutes were filed disposing of that branch of the action.

Plaintiff and defendant had entered into an agreement in May, 1904, whereby defendant admitted plaintiff into partnership with him in the jewelry business at Port Arthur. The terms of the partnership are fully set out. The last paragraph of the agreement is as follows: "12. From and after the determination of this partnership, the said Anderson shall not engage in or be interested in, directly or indirectly, any business in the town of Port Arthur competing or interfering with the business of the said Ross, and the said Anderson covenants and agrees that her husband, the said Adam C. Anderson, shall not, after the determination of this partnership, carry on or engage or be interested, directly or indirectly, in any business in the town of Port Arthur which shall compete or interfere with the business of the said Ross."

At the time this agreement was entered into, the husband, Adam C. Anderson, was largely in debt, and judgments were outstanding against him, so the partnership agreement was made with his wife, Evangeline M. Anderson, the plaintiff, who by it agreed that her husband, Adam C. Anderson, should devote his whole time and attention to the business, and no charge was to be made against the firm for his services.

Upon the termination of the agreement, one D. F. Burke purchased a jewelry business that had been carried on in Port Arthur under the name of the Port Arthur Jewelry Company, and engaged Adam C. Anderson to manage it. Mr. Burke is not a jeweller; he says that he is at the store 3 or 4 times a day, and that Anderson looks after it as a jeweller. Anderson says he manages it, and is paid \$175 per month; that he has no money invested in it, nor has his wife; that he learned defendant's private marks upon his goods and the persons from whom he bought while with him, and that he has, since connected with Mr. Burke's business, purchased similar goods from some of the same firms defendant dealt with. Wesley Henders says that Anderson is in charge of the Port Arthur Jewelry Company, and has a couple of boys there under him. Herbert Green-

land, who sold the business to Mr. Burke, says that the negotiations for sale all took place at Anderson's house; that he (Anderson) was always present; and that, so far as he knew, Anderson was carrying on the business.

I have no reason to doubt the statement of Mr. Burke that the business belongs to him, and that Anderson has no money invested in it, and it remains, therefore, to consider whether this state of facts puts the wife in breach of her covenant that the husband should not "carry on or engage or be interested, directly or indirectly, in any business in Port Arthur which shall compete or interfere with the business of the said Ross."

Defendant . . . counterclaims for damages for breach of this covenant, and his evidence is to the effect that the jewelry business which Anderson is now managing is upon the opposite corner to his, and that it interferes with and has injured his business.

Prior to the partnership Anderson had been in the wholesale jewelry business in Toronto, and his knowledge of the retail business and the local conditions connected with it at Port Arthur was gained while he was with defendant under the partnership agreement between his wife and defendant.

It was contended for plaintiff that there was no breach; that the covenant was only against the husband being engaged in or carrying on a business of his own, or in which he had some financial interest, and could not be read to prevent him working for another upon salary or for wages.

Is it open to Anderson to engage, as he has done, to manage this business as the agent of Mr. Burke, without a breach of the wife's covenant? In most of the cases in our own Courts the covenants coming in question expressly extended to prevent the covenantor from acting as the agent of another in the particular trade or business covered by the agreement: see *Cook v. Shaw*, 25 O. R. 124; *Wicher v. Darling*, 9 O. R. 311; *Turner v. Burns*, 24 O. R. 28; *Parnell v. Dean*, 31 O. R. 517.

On *Roper v. Hopkins*, 29 O. R. 580, the covenant was wider than the one in question in this action. . . .

It is stated in vol. 29 of the *Am. & Eng. Encyc. of Law*, at p. 859, that a covenant not to carry on a certain trade is broken where the covenantor does so as the agent or man-

ager or employee of another, and many American and some English cases are cited. . . . They cannot all be regarded as supporting in entirety the rule as stated; indeed many of them are clearly distinguishable. On the other hand, in *Allen v. Taylor*, 19 W. R. 35, the words were, "exercise and carry on a trade," and it was held that this meant to carry it on upon the defendant's own account. This case was discussed in *Palmer v. Mallet*, 36 Ch. D. at p. 422, where Cotton, L.J., said: "'Carrying on a trade' implies, to my mind, that the person engaged in it is engaged in it quâ trade, that is to say, as a trade producing profit or loss which is to be shared by him, and that is not the case if he is merely a salaried assistant." It is true that this was by way of distinguishing *Allen v. Taylor*. . . .

[Reference also to *Rawlinson v. Clarke*, 14 M. & W. 187; *Tabor v. Blake*, 61 N. H. 83; *Jones v. Heavens*, 4 Ch. D. 636.]

I think the weight of authority is in favour of the position contended for by plaintiff, and that the engagement of the husband as the manager, at a salary, of the business of Mr. Burke, is not a breach of the covenant.

It was not argued that there could be any injunction, and damages only were claimed.

In the view I have taken, the counterclaim must be dismissed with costs.

NOVEMBER 29TH, 1906.

DIVISIONAL COURT.

REX v. MCARTHUR.

Justices of the Peace — Conviction — Liquor License Act — Weight of Evidence — Review on Motion to Quash — Conduct of Magistrates — Costs.

Motion by defendant to make absolute a rule nisi to quash a conviction for selling intoxicating liquor without a license, contrary to the Liquor License Act.

The motion was heard by FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.

G. H. Kilmer, for defendant.

J. R. Cartwright, K.C., for the magistrates and complainant.

RIDDELL, J.:—A number of objections taken were disposed of on the argument, one of which should be mentioned in view of its bearing upon the question of costs.

The evidence having been given before two justices of the peace, they retired to consider their decision. Before announcing it they sent for and were closeted with the private prosecutor, the license inspector, for a period variously estimated at from 15 minutes to an hour or more. As all three swear that nothing was discussed or mentioned except the amount of costs to which the witnesses were entitled, we thought this was not sufficient to quash the conviction. But the circumstance was suspicious and much to be deprecated. Magistrates should remember that while the most important thing is for them to be impartial and right, it is not much less important that litigants and the public generally should believe in their impartiality and rectitude. I think that conduct of this kind should not be passed over without comment, and that it is sufficient to deprive the magistrates and inspector of costs.

Decision was reserved that we might consider how far the evidence justified a conviction.

It has long been the rule, in this Division at least, that if there were any evidence upon which a conviction could be based, the Court would not consider the weight of evidence. As it has been suggested that this rule has been relaxed, I have gone over the cases with care, and have come to the conclusion that the rule should be reaffirmed. . . .

[Reference to *Regina v. Green*, 12 P. R. 373, 375; *In re Trepanier*, 12 S. C. R. 111, 129; *Rex v. Wilkes*, 12 O. L. R. 264, 266, 7 O. W. R. 854; *Regina v. Bowman*, 2 Can. Crim. Cas. 410; *Rex v. Daun*, 12 O. L. R. 227, 235, 8 O. W. R. 173.]

The fact that no appeal lies from the decision of the justices makes no difference. Where the legislature has, of set purpose or otherwise, omitted to give an appeal, we cannot supply the omission.

I cannot find that any case lays down principles leading to a different conclusion.

The analysis of the evidence, then, being qualitative and not quantitative, it is clear that the conviction should stand.

Wakefield testifies as follows: ". . . Was in McArthur's place twice on 12th July. Called there in the morning and had a drink; supposed it was lager beer. I know what beer is; would not swear positively it was beer, but to the best of my knowledge and belief it was beer. I think it was paid for, but do not know who paid for it. Iced water was not mentioned there in my presence. I saw change was given. Saw several glasses on what I took for the bar or counter. I picked one of the glasses up and drank the contents. I did not see where it was taken from. There was a keg of beer in the other rig, and it reached there just ahead of us. Both rigs contained Orangemen going to Paisley to attend the celebration. The keg referred to was not taken out of the rig at McArthur's to the best of my knowledge.

There is enough here to justify the magistrates in finding that a sale had been made to Wakefield in violation of the Act.

Rule discharged without costs.

FALCONBRIDGE, C.J., and BRITTON, J., gave reasons in writing for the same conclusion.

NOVEMBER 29TH, 1906.

DIVISIONAL COURT.

WALKERVILLE BREWERY CO. v. KNITTLE.

Costs—Action by Execution Creditors for Declaration that Land Subject to Execution—Class Suit—Payment of Execution Creditors' Claim—Disposition of Costs.

Appeal by the plaintiffs from the judgment of TEETZEL, J., dismissing without costs an action brought by execution creditors of John Knittle, deceased, against his widow, for a declaration that certain lands conveyed to her in her husband's lifetime were in reality his property and exigible under plaintiffs' execution.

W. R. Smyth, for plaintiffs.

I. Grenizen, Petrolia, for defendant.

THE COURT (BOYD, C., MAGEE, J., MABEE, J.), postponed the determination of the appeal for a certain period in order to allow the defendant to pay the plaintiffs' claim, which she did.

The judgment of the Court was delivered by

BOYD, C.:—In this case, after trial had before Teetzel, J., he dismissed the action without costs. There were reasons why he might well adopt this course as to costs. Plaintiffs now seek to vacate the result of the trial and have a new trial. We could not grant this except on the usual terms as to payment of costs of the futile trial. But at our suggestion we gave opportunity to defendant to settle the claim of the creditors who sue, and this has been done as reported to us. This payment of the creditors who sue representatively is an end of the action if made before judgment: *Driffil v. Ough*, ante 496. It would leave only the costs incurred up to the date of payment to be disposed of. It does not appear to be of use to have further argument as to this matter of costs. I think substantial justice will be done by letting each party answer his own costs. And that will be the judgment of the Court: no costs, and the suit is ended by payment.

MACMAHON, J.

NOVEMBER 30TH, 1906.

TRIAL.

HARVISON v. CORNELL.

Master and Servant—Contract of Hiring—Covenant by Servant not to Enter into Similar Employment at Termination of Engagement—Oppressive and Void Contract—Wrongful Dismissal—Damages—Evidence—Admissibility.

Action by defendant's former employer to recover damages for an alleged breach by defendant of a covenant contained in the contract of hiring, and counterclaim by defendant against plaintiff for breach of the contract by dismissal of plaintiff.

C. A. Masten, for plaintiff.

W. H. Blake, K.C., for defendant.

MACMAHON, J.:—Defendant prior to entering the service of plaintiff had been employed in driving a laundry waggon in the city of Hamilton. About 5th September, 1905, plaintiff, a tea merchant in Hamilton, then owning two delivery waggons for use in his business of selling and delivering tea in and about Hamilton, employed defendant as driver and to sell and deliver tea on one of the routes.

On 2nd October defendant entered into a written agreement to act as salesman and delivery clerk for plaintiff for 12 months, for which he was to be paid \$10 a week and a commission of 12 per cent, on cash collected over \$75 per week, providing the average was continued for the month.

The following clause was contained in the agreement: "And I, the said party of the second part (defendant), do hereby agree and do accept the position of representative salesman and delivery clerk for the term of 12 calendar months from the date of the agreement, and do solemnly promise, and by virtue of my signature below and in the presence of two witnesses whose names appear at the foot of this agreement, that upon the expiration of this agreement, or its termination at any time for whatsoever reason, not to enter into the employ of any party or parties engaged in the sale of tea, or house to house sale of tea, in the province of Ontario, for the space of 12 calendar months from the expiration of this agreement, nor enter into any partnership with any party or parties directly or indirectly engaged in the tea business as before specified in the said province of Ontario, nor to myself commence the business of selling tea on my own account in the said province of Ontario for the space of 12 calendar months from the expiration of this agreement for whatever reason."

Defendant continued in the employment of plaintiff for 48 weeks, his average wages during that time being \$15.11 a week. Early in August, 1906, plaintiff's business was turned into a limited liability company . . . and plaintiff . . . was appointed general manager and treasurer.

A few days before 27th August, plaintiff called defendant into the . . . company's shop, and read over to him an agreement which he desired him to sign, whereby he was to enter the service of the . . . company for a period of 12 months from the date of the document (blanks being left for the date), on the same terms and conditions as those

upon which defendant had been employed by plaintiff, with the exception, defendant said, that the agreement as read to him provided for payment to him of 10 per cent. instead of 12 per cent. commission. Defendant said he would require to consider it . . . On 27th August . . . defendant said he would sign it if his wages were increased by \$2 per week. This plaintiff refused to give. Plaintiff then said he had instructions from the president of the company not to let a driver go out unless he signed the contract. Defendant then went outside to the delivery waggon and asked plaintiff if he was discharged. According to plaintiff, his answer was, "No, not discharged, but I have no further work for you." The evidence of John W. Ellitt (a stockholder in the company) and of defendant is, that what plaintiff said was, that he had instructions from the president not to let a driver go out unless he signed the contract. This I regard as the true version of what took place.

Defendant accepted that as a dismissal, and I find that he was justified in so doing. He then procured employment in connection with a similar business in Hamilton.

Defendant, at the time he signed the agreement of 2nd October, 1905, was just 18 years old, and he said that before signing he asked plaintiff what the meaning of the clause commencing "not to enter into the employment of any party," etc., was, and he said that plaintiff told him that it did not matter much, and on that he signed the agreement. That statement remained uncontradicted by plaintiff, so it must be taken that the assurance was given to defendant that that part of the contract was not of any moment.

Defendant, about 6th September, 1906, purchased from one Martin Sickle a small tea business in Hamilton. . . . Plaintiff obtained an injunction on 15th September, and defendant's shop was closed for about a fortnight, when the injunction was dissolved.

The business that plaintiff had in Hamilton was not an extensive one, being carried on at first with two waggons, and after a time a third waggon was employed in the service. The territorial scope of the business was not wide, being 30 miles to the east, at Dunnville, 20 miles to the south, at Caledonia, and 7 or 8 miles to the north, at Waterdown; and it was in contemplation to extend as far west as Brantford, a distance of about 30 miles. . . .

[Reference to *Harner v. Graves*, 7 Bing. 735; *Mallom v. May*, 11 M. & W. 667; *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A. C. 535; *Leather Cloth Co. v. Lorsche*, L. R. 9 Eq.; *Rousillon v. Rousillon*, 14 Ch. D. at p. 369; *Underwood v. Baker*, [1899] 1 Ch. 300; *Badische Anilin und Soda Fabrik v. Schott*, [1892] 3 Ch. 487; *Haynes v. Doman*, [1899] 2 Ch. at p. 24.]

If a person in the same business were to give evidence as to what precautions were required in order to protect his business, he would be stating what he conceived would be a reasonable contract for the protection of his interests; and it is in relation to that that a witness is precluded from expressing an opinion.

Evidence was tendered as to contracts entered into by a tea merchant in Montreal with his salesman and delivery clerk, where the business was extended to Ottawa, Kingston, and other places in Ontario far distant from Montreal. The evidence was also tendered of Mr. Whaley, the president of the Ocean Blend Tea Co. of Toronto. . . . I rejected the evidence in each case because the nature and magnitude of the trade conducted by these establishments would be no guide as to what is customary or what precautions would be required in a small business like plaintiff's. . . .

Not only was the territory over which plaintiff's business was carried on very restricted, but the sales were very limited; so that, in my view of the evidence, it would be preposterous to hold that the clause complained of in the agreement was necessary for the protection of plaintiff's interests, and it is therefore oppressive and void.

Action dismissed with costs. Damages of defendant on his counterclaim assessed at \$200, and judgment against plaintiff for that sum with costs.

NOVEMBER 30th H. 1906.

DIVISIONAL COURT.

REX v. SPELLMAN.

Police Magistrate—Jurisdiction—City Magistrate—Appointment of Magistrate for County—Conviction—Motion to Quash.

Motion by defendant to quash his conviction by D. W. Dumble, police magistrate for the city of Peterborough, for

selling intoxicating liquor without a license, in the village of Lakefield, in the county of Peterborough, upon the ground that the magistrate had no jurisdiction.

The motion was heard by FALCONBRIDGE, C.J., BRITTON, J., MABEE, J.

J. Haverson, K.C., for defendant.

J. R. Cartwright, K.C., for the Crown.

BRITTON, J.:—On 31st August, 1906, at the city of Peterborough, defendant was convicted by D. W. Dumble, as police magistrate for the city of Peterborough and for the county of Peterborough, of selling intoxicating liquor at Lakefield, in that county, without having a license to sell. Spellman was fined \$100.

The objection strongly pressed by counsel for defendant was that Dumble had no jurisdiction to try the accused for the offence, because (a) he is not police magistrate for the county, and (b) as police magistrate for the city he had no jurisdiction to try a man for an offence committed in the county outside of the city, there being a police magistrate for the county, and in this instance Dumble was not acting because of the illness or absence or at the request of that county police magistrate.

Dumble was appointed a police magistrate for the then town of Peterborough on 25th November, 1882. He still holds the office for the city of Peterborough—that is conceded. His appointment as police magistrate for the town was authorized by R. S. O. 1877 ch. 72.

The statute 41 Vict. ch. 4, sec. 9, authorized the appointment of a police magistrate for a county, etc., and on 22nd April, 1886, Dumble was appointed a police magistrate for the county of Peterborough. This sec. 9 was carried into R. S. O. 1887 as sec. 9 of ch. 72.

In 1885, by 45 Vict. ch. 17, sec. 1, provision was made for the appointment of a salaried police magistrate for the county after the passing of a resolution by the county council affirming the expediency of such appointment. This authority is continued by R. S. O. 1887 ch. 72, sec. 8, and by R. S. O. 1897 ch. 87, sec. 15.

George Edmison was appointed a police magistrate for the county of Peterborough on 30th July, 1889. . . .

The appointment of George Edmison cannot, in the circumstances, be considered to be in any way "in the place and stead" of Dumble, and so Dumble's appointment for the county is not revoked.

But, further, I agree with the argument for the Crown that Dumble, as police magistrate for the city, and adjudicating in the present case, was within his jurisdiction.

The powers given to the police magistrate for a town or city by R. S. O. 1877 ch. 72, secs. 4 and 7, are continued by R. S. O. 1897 ch. 87, secs. 27 and 30.

By sec. 27 Dumble is *ex officio* a justice of the peace for the whole county of Peterborough.

By sec. 30, sitting as a police magistrate he has power to do alone whatever is authorized by any statute in force in Ontario, within the legislative authority of the province, to be done by two or more justices of the peace, and he has that power while acting anywhere within the county for which he is *ex officio* a justice of the peace.

My opinion is confirmed by sec. 350. . . .

The inference is that a police magistrate for a town or city has jurisdiction in the county and outside of what may be called his limits, if he chooses to exercise it, although he is not bound to do so. Section 17 does not, I think, restrict the action of a police magistrate. Section 20 is restrictive, but only to police magistrates appointed for county or district or part of a county or district. *Hunt q. t. v. Shaver*, 22 A. R. 202, emphasizes the distinction created by statute between a police magistrate when acting either as such or as *ex officio* justice of the peace.

The conviction should be affirmed without costs.

FALCONBRIDGE, C.J., gave reasons in writing for the same conclusion, referring to *Smyth v. Latham*, 9 Bing. 692, 710; *Robertson v. Freeman*, 22 U. C. R. 298.

MABEE, J., concurred.

NOVEMBER 30TH, 1906.

C.A.

REX v. BURR.

Criminal Law—Seduction of Girl under 16—Evidence—Corroboration—Acquittal—Appeal by Crown—New Trial—Criminal Code, sec. 746.

Case stated by the acting Chairman of the General Sessions of the Peace for the county of Kent, pursuant to the direction of the Court of Appeal, under sec. 743 of the Criminal Code.

The accused was placed on trial at the sittings of the General Sessions of the Peace for Kent in June, 1906, at which the junior Judge of the County Court was presiding as Chairman.

The indictment charged that the accused seduced and had illicit intercourse with a girl of previously chaste character above the age of 14 years and under the age of 16 years, not being his wife.

The girl testified to acts of illicit intercourse between her and the accused, and other witnesses were examined for the purpose of corroborating her testimony.

At the conclusion of the evidence for the Crown, the Chairman ruled that there was not the corroboration required by sec. 684 of the Criminal Code, and he withdrew the case from the jury, and directed the accused to be discharged.

The question submitted was whether the ruling was right.

The case was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

J. R. Cartwright, K.C., for the Crown.

O. L. Lewis, Chatham, for the accused.

MOSS, C.J.O.:—Under sec. 684 a person accused of an offence of the nature charged in this case is not to be con-

victed upon the evidence of one witness unless such witness is corroborated in some material particular by evidence implicating the accused.

This does not necessarily make it incumbent upon the Crown to adduce testimony of another or other witnesses to the acts charged. To do so would be virtually to render a conviction impossible in the majority of cases like the present. It is enough if there be other testimony to facts from which the jury, or other tribunal trying the case, weighing them in connection with the testimony of one witness, may reasonably conclude that the accused committed the act with which he is charged.

In this case it was shewn that the accused was seen taking improper liberties with the girl on more than one occasion, and that he had on at least two occasions expressed a strong desire for sexual intercourse with her.

And there was also given in evidence a statement made by him after the alleged offence from which it might not unreasonably be inferred that he had availed himself of the opportunity afforded him through the absence from home for some days of the girl's parents, during which he was left in charge of the house where the girl and her young brothers and sisters were.

These matters were material to the charge, and pointed to the accused as the perpetrator of the offence, and they should not have been withdrawn from the jury.

The answer to the question, therefore, should be in the negative, and, under all the circumstances of the case, a new trial should be directed.

It may, however, be pointed out that sec. 746 of the Code does not make it obligatory on the Court to direct a new trial in every case which comes before it under the jurisdiction conferred by the Code.

The language of the section is permissive, and the Court, in addition to the other powers conferred upon it, is enabled to make such other order as justice requires. The matter is left to the Court to exercise its discretion in each case as the circumstances seem to require.

It follows that there can be no general rule, and the Court ought not, in any one case, to attempt to lay down what considerations should govern in another. The con-

siderations influencing the exercise of discretion in one class of cases may differ materially from those affecting it in another class. Especially may this be so in cases where the accused has been discharged, and the Crown is appealing. There the same considerations as would govern where the accused has been convicted, and is the appellant, would not necessarily be applicable: *Rex v. Karn*, 5 O. L. R. 704, 2 O. W. R. 335.

Having regard to the nature of the offence and the circumstances under which it has been sworn it was committed, the present case is one in which the discretion should be exercised in such manner as to afford the Crown an opportunity of once more putting the law in motion against the accused, if it thinks fit to do so.

OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A., concurred; OSLER and MEREDITH, JJ.A., giving reasons in writing.

NOVEMBER 30TH, 1906.

C.A.

BALDOCCHI v. SPADA.

Bankruptcy and Insolvency — Transfer of Goods by Insolvent to Creditor — Preference — Presumption — Rebuttal — Absence of Fraudulent Intent — Actual Advance of Money.

Appeal by plaintiffs from judgment of BRITTON, J., at the trial (7 O. W. R. 325) dismissing an action brought by creditors of defendant Spada to set aside a transfer of certain goods by defendant Spada to defendant Garborino, upon the ground that such transfer was made with intent to give to defendant Garborino a fraudulent preference over the other creditors of defendant Spada.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

R. McKay and G. Grant, for plaintiffs.

J. Tytler and R. G. Smythe, for defendant Garborino.

GARROW, J.A.:—The facts are very fully set forth in the careful and well reasoned judgment of Britton, J., and, approving, as I do, of his conclusions, I have very little to add.

The main question was one of fact, namely, did Garborino know, or should he have inferred from the facts and circumstances within his knowledge, that Spada was insolvent at the time the impeached transaction was entered into, No doubt Spada knew, and he may have intended to prefer his old friend and fellow-countryman, but his knowledge and intention alone are not sufficient.

Upon the question of Garborino's knowledge or lack of knowledge much depended upon whether Garborino's own evidence was believed or not, in other words, upon his credibility. Britton, J., evidently regarded him as credible, and based his conclusions of fact upon that assumption. Under these circumstances, it is not, I think, open to an appellate court to reverse his findings unless it clearly appears either that the facts deposed to are in themselves insufficient in law to constitute a good defence, or that unwarranted inferences have been drawn from indirect facts, or other apparent error committed in reaching the conclusion in question. In my opinion, none of these appear. I have read carefully the evidence, and I would, I think, have reached the same conclusions as those of the learned Judge at the trial. Regard must be had to the whole course of dealing, and not to the few isolated remarks, after the event, which fell from defendant Garborino in his examination, about feeling "funny" and "afraid." They were both Italians, Garborino at least with an imperfect knowledge of English. Spada had begun as a dealer in fruits in a small way in the western part of the city, and had prospered until he had an extensive wholesale shop and business much nearer the business centre. Garborino was in a somewhat similar line of business, but in a much smaller way. He appears throughout to have had the utmost confidence in Spada. He had proved this before the transaction in question by making to him from time to time very considerable loans, amounting in all to \$2,500, without asking or obtaining any security; and the readiness with which he concurred in Spada's suggested mode of carrying out the transaction now in question shews that his confidence had not been impaired. Spada's business was then to all appearances as flourishing as ever. It was

no unusual thing for a business man, importing large quantities of merchandise from foreign countries, to require at times to borrow money, or even to hypothecate warehoused goods. He saw Spada make a large deposit at the Imperial Bank to release that bank's warehouse receipt, and may well have thought that, with the aid of the \$1,900 which he was to advance, Spada's chief liabilities would be satisfied. The matter was gone about very deliberately. There was no apparent haste, no solicitors were employed. There was no pressure or urging on the part of Garborino, except that he very naturally wished to have matters so arranged that his own money deposited in the Dominion Bank might be released. These and other circumstances, all consistent, all go to shew that at least defendant Garborino believed he was dealing with a perfectly solvent debtor, in no real financial difficulty whatever, and had on his part certainly no actual intent in what was being done to obtain a preference over Spada's other creditors.

And, in my opinion, there was, in addition, an actual bona fide advance of the \$1,900, within the meaning of sec. 3, sub-sec. 1, of R. S. O. 1897 ch. 147, sufficient to sustain the transaction, as was apparently also the opinion of Britton, J., although he preferred to rest his judgment upon the other grounds. See *Campbell v. Roche*, 18 A. R. 646, 21 S. C. R. 645.

MOSS, C.J.O., OSLER and MACLAREN, J.J.A., concurred.

MEREDITH, J.A., dissented for reasons given in writing.

NOVEMBER 30TH, 1906.

C.A.

PARADIS v. NATIONAL TRUST CO.

Contract—Sale of Railway Charter—Share of Promoter in Proceeds—Remuneration for Services—Amount Fixed by Referee—Quantum Meruit—Evidence.

Appeal by defendants from order of a Divisional Court (7 O. W. R. 756) reversing judgment of TEETZEL, J., at the trial, dismissing the action.

Defendants were executors of the will of one Ernest Albert Bremner, who died on 21st June, 1903. The action was to recover from the estate the sum of \$4,000 in respect of certain dealings and transactions between plaintiff and Bremner. The trial Judge dismissed the action without costs. The Divisional Court reversed the judgment of the trial Judge and awarded plaintiff \$2,000 and costs, with liberty to amend his pleadings as he might be advised, in view of the evidence at the trial. Defendants appealed and asked that the judgment of the trial Judge should be restored.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

W. H. Blake, K.C., for defendants.

C. A. Moss and Featherston Aylesworth, for plaintiff.

GARROW, J.A.:— . . . At the trial Teetzel, J., asked counsel for plaintiff this question: "Are you endeavouring to prove some right of action or indemnity outside of these two documents?" To which counsel replied, "No, my Lord, outside of the two documents, and the award or appraisalment." And this formulation of plaintiff's claim was, in my opinion, after a perusal of the whole case and without regard to the strict form of the pleadings, an entirely proper one, for I think it entirely out of the question to construct out of the vague and highly unsatisfactory evidence as to conversations with Bremner and Armstrong an additional oral agreement of any kind. The thing which plaintiff had to sell and which Bremner desired to acquire was plaintiff's interest in the charter as one of the incorporators and provisional directors. By the first of the two documents plaintiff assigned this interest to Bremner for the expressed consideration of \$100, and his share in the 30 per cent. interest to be divided among the provisional directors, but, in addition, by the terms of the second document of contemporaneous execution if not of date, he was also to get such additional consideration as might, under the terms of that document, be fixed by Mr. Armstrong. And this second document should, I think, be read with the telegram at once sent by Bremner to Armstrong apprising him of what had been done, put in at the trial by plaintiff. The second document speaks of "the basis" that might be approved of by

Mr. Armstrong, and the telegram adds the term "inside basis, approved by you." . . .

Plaintiff's oral testimony practically agrees with the terms of the telegram, that what was really agreed upon was that he should, notwithstanding the assignment, be put upon the inner circle, or inside basis, with Bremner and others who comprised the circle, to such extent as should be approved by Mr. Armstrong.

It is not difficult, in the circumstances, to assign a meaning to these terms, "inside circle or basis." Indeed they almost speak for themselves. The parties were dealing with that very peculiar property, if it can be called property at all, a railway charter. They had no means to build the railway itself nor any intention to do so. But what they did intend to do, as the evidence shews, was to turn over the charter, for a price, to capitalists who might build; and the price would, when received, be shared in by those on the "inside basis." And, in my opinion, what was referred to Mr. Armstrong, and all that was referred to him, was to fix what portion or proportion of the proceeds of a sale, which would be going to those in the inner circle, should go to plaintiff. If nothing was received, he would, of course, get nothing. If something, then he would get such share as might be awarded either before or after a sale by Mr. Armstrong.

The evidence is, that nothing was received, or rather it might with better propriety, perhaps, be put thus. Plaintiff, upon whom rested the burden of proof, has not proved that Bremner received anything for the charter. So that, even if plaintiff obtained from Mr. Armstrong such an award as he had power to make, which, in my opinion, he has not, his action must for this reason have failed.

No doubt, plaintiff has been in a way hardly dealt with. He has in a large and public spirited way expended both time and a very considerable sum of money upon what is called the tote road. But a tote road, however useful to settlers and others going in, is not a railway, nor even a necessary adjunct to a railway. And in any event that tote road is as much plaintiff's as it ever was. Bremner did not by the transaction in question acquire it, not apparently at any time desire to do so. On the other hand, the evidence shews that plaintiff's actual expenditure in connection with

obtaining the charter was trifling, his whole claim upon the ground of expenditure practically resting upon his tote road expenditure. Considerations such as these induce me to think that a keen business man like Mr. Bremner could not have been so foolish as to entertain, much less to countenance, such extravagant demands for plaintiff's share in the charter as those now put forward by plaintiff and apparently acquiesced in by Mr. Armstrong, to judge by his so-called award.

The appeal should be allowed, and the judgment of Teetzel, J., restored, plaintiff paying the costs of the appeal to the Divisional Court and to this Court.

MEREDITH, J.A., gave reasons in writing for the same conclusion.

OSLER and MACLAREN, JJ.A., concurred.

Moss, C.J.O., dissented, agreeing with the opinion of the Divisional Court, for reasons stated in writing.

NOVEMBER 30TH, 1906.

C.A.

SCHWOOB v. MICHIGAN CENTRAL R. R. CO.

Master and Servant — Injury to Servant and Consequent Death—Negligence—Common Law Liability — Workmen's Compensation Act—Defect in Engine—Repair—Inspection—Reasonable Care—Person Intrusted with Duty of Providing Proper Appliances — Findings of Jury — Interpretation of—Refusal to Grant New Trial.

Appeal by defendants from judgment of TEETZEL, J., at the second trial of this action, refusing a nonsuit and directing judgment to be entered for plaintiff for \$9,000 damages as assessed by the jury. The judgment of a Divisional Court directing the new trial is reported in 5 O. W. R. 157, 9 O. L. R. 86, and was affirmed by the Court of Appeal: 6 O. W. R. 630, 10 O. L. R. 647. The action was brought by

the widow and administratrix of the estate of Robert H. Schwoob, deceased, to recover damages for his death, while in the employment of defendants as a locomotive fireman, from injuries received by the drawing out from the hot water tank on which the deceased was employed, of one of the hot water tubes or pipes, with the result that hot water and steam escaped in large quantities and scalded the deceased. Defendants pleaded that no negligence was shewn and no liability existed at common law nor under the Workmen's Compensation Act.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

I. F. Hellmuth, K.C., and D. W. Saunders, for defendants.

T. W. Crothers, St. Thomas, for plaintiff.

OSLER, J.A.:— . . . The evidence fails to make out a case of common law liability on the part of the company.

The judgment may, however, be supported for damages under the Workmen's Compensation Act, if the findings of the jury, either by themselves or read with the learned Judge's charge and with facts proved or admitted and not denied, come up to what is required by that Act in order to fix liability upon an employer. Upon the whole I think they do.

The case was very fully and carefully explained to the jury in the Judge's charge, and the difference between the liability of the employer at common law and under the statute pointed out to them. It is very evident that they meant, if they could possibly do so, to fasten upon the defendants that ground of liability which would enable them to assess the damages at large. That result cannot stand, but certain of the findings may be referred to to support the judgment for the reduced sum recoverable on the narrower ground.

They found that the death of the plaintiff's husband was caused by reason of a defect in the condition or arrangement of the locomotive on which he was working. Their answer to the second question, as to what such defect consisted in, is that the defect occurred by the defendants "not supplying proper inspection," and, as want of inspection, unless

there was some existing defect which inspection would have disclosed, is not defect, or, by itself, negligence, the answer is not very intelligible until it is remembered that the only defect about which the contest was waged throughout the trial was that the tubes of the engine had not been properly belled, and in the conversation which took place between the trial Judge and the jury, after they had brought in their answers to the first set of questions, this is made clear. They all agreed, they said, that the defect which caused the accident was that the bellying of the tube had not been properly done, adding that there should have been some inspection which would have discovered it.

The answers to questions 3 to 6 may be passed over; indeed, it may be more properly said that the jury left these questions unanswered by referring in each instance to their answer to question 2, as making it unnecessary to give specific answers, their finding as to the ground of liability resting upon that. After the discussion referred to, the jury, in answer to further questions founded upon it, said that there was a defect in the way the tube was fixed in the boiler by Jeffers at the time it was put in, and that this defect was that it was not properly belled. Reading these answers with the answer to the first question and the discussion referred to, a case for liability under sec. 3 (1) of the Act is made out, subject to the qualification of sec. 6 (1) being also established, namely, that Jeffers, the person from whose negligence the defect in the locomotive arose, was a person who had been intrusted by the defendants with the duty of seeing that its condition was proper. There is no dispute, there was none throughout the whole course of the trial, and the Judge in his charge referred to it again and again, that Jeffers was the person in the employ of defendants who was so intrusted. We have it, therefore, established that the death of plaintiff's husband was caused by a defect in the condition of the locomotive on which he was working; that this defect consisted in the improper way in which Jeffers fixed the tubes in the boiler of the locomotive; and that he was the person who had been intrusted by defendants with the duty of having this properly done, in other words, the duty of seeing that the condition of the locomotive was proper. This is all that is necessary to fulfil the requirements of the Act in such a case as the present.

I am unwilling to send the case down for a third trial without any prospect of a different result, if by any reasonable interpretation of the answers of the jury, read in the light of the charge and the admitted facts, this can be avoided. If I have been unduly swayed by this consideration I must leave it for a higher tribunal to say so.

See *Jamieson v. Harris*, 35 S. C. R. 625; *Tooke v. Bergeron*, 27 S. C. R. 567; *Moore v. Grand Trunk R. W. Co.*; in the Supreme Court of Canada, not reported, and of which the ground of decision is not yet known.

The judgment should, therefore, be varied and the recovery limited to the alternative amount found by the jury (\$3,240), the method of arriving at which was not complained of.

There will be no costs of the appeal, success being divided.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., concurred.

MEREDITH, J.A., agreed, for reasons given in writing, that plaintiff could not recover at common law, but was of opinion that there should be a new trial, limited to the claim under the Workmen's Compensation Act.

NOVEMBER 30TH, 1906.

C.A.

RE McKENNA AND TOWNSHIP OF OSGOODE.

Municipal Corporations — Drainage — Petition for Drainage Scheme—Report of Engineer—Delay in Making—Death of Petitioners meanwhile — Extensions of Time by Council after Time Expired — Invalidity of Report — By-law Founded thereon—Powers of Council—Provisions of Drainage Act—Conditions.

Appeal by the township corporation from the report of the Drainage Referee, made in a proceeding instituted by notice of motion for an order to set aside and declare void

a petition for a scheme of drainage, the report of the engineer of the township, and the resolution of the council adopting the report, and the by-law in reference to the scheme which was provisionally adopted by the township.

The Referee allowed the motion and restrained the corporation of the township from proceeding with the drainage work set forth in the engineer's report.

The township corporation appealed, contending that the Referee's decision should be reversed.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

M. Wilson, K.C., for appellants.

F. R. Latchford, K.C., for respondents.

MOSS, C.J.O.:—The record of the proceedings before the Referee discloses a case with some features which are unusual, if not wholly exceptional, in a drainage case. A proposal by a farmer named O'Connor to provide drainage for his farm of 125 acres, by a ditch constructed under the provisions of the Ditches and Watercourses Act, seems to have developed and expanded into a scheme of drainage which involves some 23,000 acres of land and an expenditure of over \$13,000.

The township engineer, to whom O'Connor's requisition under the Ditches and Watercourses Act was referred, concluded, as the result of a friendly meeting, that no drainage scheme could be carried out under the Ditches and Watercourses Act, because it would involve an expenditure of more than \$1,000. Thereupon he prepared a petition for drainage of an area comprising between 700 and 800 acres of land under the Drainage Act, and handed it to O'Connor to procure signatures. The signatures of 7 persons, forming, it is said, a majority of the owners entitled to petition in respect of the area, were affixed to the petition, and so signed it was presented to the township council in August, 1900, and a by-law was then passed appointing the engineer to make an examination and report. No report was made until 25th February, 1905, and no excuse is shewn for the delay except a statement of the engineer that he was unable, owing to press of other work and lack of assistance, to pro-

ceed with the examination of the area involved. His report was considered by the council on 25th March, 1905, and was referred back to the engineer to amend. The amended report was made on 1st June, and adopted by the council on the 20th of the same month, and on 26th July following the by-law was provisionally adopted.

Before the first report was presented to the council, two of the original 7 petitioners had died. Those of the remaining 5 who attended the meeting of the council at which the report was read on 25th March, 1905, were amazed to discover the magnitude of the proposed scheme and the expense which it involved. They would have been willing to drop proceedings or to withdraw from the petition but for the provisions of the Drainage Act, which, in that event, would impose upon them the engineer's costs and other expenses connected with procuring the report. The total expenses were so large that it was apparent that it would be a saving to them to allow the scheme to be carried through and bear their share of the assessment. But the applicants, who were not petitioners, or interested in the area described in the petition, but are owners of land situate in the vicinity of the drain as it extends from the place of commencement towards its final outlet, and are assessed for benefit and for outlet liability, were dissatisfied and took action before the Drainage Referee.

The chief points in dispute on the appeal were whether, having regard to the area described in the petition, the petition was to be deemed sufficiently signed when the council adopted the engineer's report and provisionally passed the by-law; whether the report was one that could be sustained, having regard to the lapse of time between the appointment of the engineer and the making of his report; and whether the by-law could properly provide for work in a natural stream, with well defined banks, which was made the outlet of the drain. The commencement of the drain was about 4 miles from the point where it entered the natural channel.

It appears that the engineer did nothing within the first 6 months after his appointment. By sec. 9 (8) of the Drainage Act, the council is empowered to extend the time for the engineer making his report, providing it is satisfied that owing to the nature of the work it was impracticable to do it within the 6 months. There were a number of exten-

sions granted, but several of them were after the extended time had expired, so that there were periods when the engineer had no authority or right to proceed with the work, and the council did not act upon the right given it by sub-sec. (9) of sec. 9, to procure another engineer to go on with the work.

These facts raise the important question, whether there was a valid report upon which the council could lawfully pass a by-law for the performance of the work and the imposition of the assessments provided for by the report.

The obvious intent of the Drainage Act is that work to be performed under its provisions shall be proceeded with and brought to a termination with reasonable expedition. The nature of the injury from which relief is sought demands that there shall be no unreasonable delay in supplying the remedy which the owners of the lands to be benefited are seeking.

To unduly delay . . . is almost certain to prove a serious prejudice, not only on account of the withholding of the remedy, but because of the inevitable changes in the title and proprietorship of the lands in the area described in the petition which lapse of time is almost certain to bring about. It is the duty of the council of the municipality, once it has undertaken the prosecution of the drainage scheme petitioned for, to see that it is proceeded with as promptly as the circumstances of the case permit, and to allow no undue delay on the part of the engineer in making and filing his report.

This would be their duty apart from any legislation. But sec. 9 (8) of the Drainage Act provides that "the report of the engineer shall be filed within 6 months after the filing of the petition; provided that upon the application of the engineer, the time for filing the report may be extended from time to time for additional periods of 6 months, when the council is satisfied that, owing to the nature of the work, it was impracticable for the report of the engineer to be completed within the time limited by law." The time limited by law is 6 months from the filing of the petition. If an engineer fails to file his report within that time, and there be no further action of any kind on the part of the council, the petition of necessity falls to the ground. But this result may be averted in one of two ways—either the council, if

satisfied that owing to the nature of the work it was impracticable for the report to be completed within the time limited, may under sub-sec. (8) extend the time, or it may, under sub-sec. (9), employ another engineer to make the necessary report.

The power of extension given can only be exercised, however, under the condition described in sub-sec. (8). It is a limited power to extend for good cause. It is dependent upon inability of the engineer owing to the nature of the work, not upon dilatoriness or supineness on his part.

In this case there is no pretence that there was any good cause for the council assuming to extend the time. Their actions shew that very plainly. And the engineer's only excuse was, as before stated, press of other work and lack of assistance. The council, therefore, had no power and no right to assume to extend the time beyond that limited by law. Moreover, when they did assume to make extensions, the engineer allowed the periods so given to expire, and there were times when there was no authority whatever to the engineer. The petition then lapsed and could only be revived, if at all, by the council employing another engineer. But this was never done. It is said that by again assuming to extend the time for the engineer they in effect employed another engineer. But to so hold would be to countenance a direct violation of the law, and to deprive the petitioners and others interested in the drainage scheme of the protection given by sub-secs. (8) and (9) of sec. 9. If the council may without any excuse or reason retain the services of a dilatory engineer for years after he could and should have made his report, they may retain him until all the petitioners have died or left the area proposed to be benefited, or have from other causes lost all interest in the prosecution of the scheme.

The proper conclusion is, that when the report was made the petition was not on foot, and there was, therefore, no warrant to the council for adopting the report or founding a by-law upon it.

It would appear a very extraordinary thing that a proceeding of this kind, which, from its very nature, demands expedition, should be allowed to remain untouched for a period of nearly 5 years, and then, when the circumstances have changed in several important respects, be brought for-

ward in the form of a scheme of the magnitude of that proposed by the report and by-law. The delay, which is unexcused and inexcusable, and the change of circumstances, should have furnished the council with sufficient reasons for not permitting the matter to proceed further. If there is to be a drainage scheme such as is proposed, it surely ought to be initiated at the instance not of the few persons upon whose petition this large scheme has been promulgated, but upon the petition of a fair majority of those who are proposed to be assessed for benefit. They are the persons who will be vitally interested in its performance.

One remarkable feature of the report is that it seems to shew that the scheme now proposed to be carried out is not one which will materially assist the parties to the petition, but is directed to the drainage of a different area. The report states that "on looking at the assessment plan A, it will be apparent that a large area of low land is at present without sufficient drainage, and it is with a view to improve this land and adjoining properties, which are at present submerged for the greater part of the year, that the present drainage system is proposed."

It surely ought to be the case, if the proposed scheme is really for the purpose of improving this large area of low land, that the owners, who are interested in that project, should be the persons to say whether or not they desire such a scheme; and certainly the parties to the present petition should not be held responsible for a scheme which has so far exceeded their intentions.

The report and by-law should not be allowed to stand; and, that being so, it is not necessary to deal with the other matters urged in support of the Referee's decision, though it is not to be assumed that they are considered of no weight.

Whether the petition ought to be deemed sufficiently signed or not can be of little importance, for it can hardly be supposed that the council of the township would, under the circumstances, assume to procure another report and proceed with another scheme founded upon that petition.

The appeal should be dismissed with costs.

OSLER and MEREDITH, JJ.A., each gave reasons in writing for the same conclusion.

GARROW and MACLAREN, JJ.A., also concurred.

BRITTON, J.

DECEMBER 1ST, 1906.

TRIAL.

ANTOINE v. DUNCOMBE.

Negligence—Druggist—Sale of Liniment Containing Poison—Neglect to Label as Poison—Warning to Purchaser—Death of Purchaser by Drinking—Liability of Druggist—Action under Fatal Accidents Act—Expectation of Benefit.

Action by Mary Antoine for damages for the death of her husband, Nicholas, and her son Job, she alleging that the death of each was occasioned by the negligence of defendant, a druggist residing in St. Thomas, in selling to Nicholas Antoine a bottle of poison without labelling the bottle or notifying the purchaser that the contents were poisonous.

A. G. Chisholm, London, for plaintiff.

J. C. Judd, London, and A. Grant, St. Thomas, for defendant.

BRITTON, J.:—Nicholas Antoine was an Indian belonging to the Oneidas and residing upon the reserve near St. Thomas. On Saturday 4th November, 1905, Nicholas, his son Job, and another Indian named Cornelius went into the city of St. Thomas. Nicholas seems to have procured two bottles, and from one or both of these bottles the three drank, and shortly afterwards became seriously ill, and all three died. Job died on Sunday 5th November, Nicholas on Monday 6th, and Cornelius on Tuesday 7th. An inquest was held upon the remains of Job Antoine, and a post mortem was had, with the result that the cause of death was ascertained by Dr. McNeil as being the taking into the stomach of "some narcotic irritant." Dr. McNeil said that

"wood alcohol" or "Columbian spirits," as wood alcohol is called, when purified or deodorized, would produce the condition found in the case of Job Antoine. There was no post mortem in the case of Nicholas Antoine, but, as his death occurred in circumstances similar to Job's, I am warranted in drawing the inference that death was from a like cause.

It is charged that defendant sold to Nicholas on 4th November, 1905, two bottles of something used as a liniment, the principal ingredient of which was wood alcohol, and that these bottles were so sold without labelling them as containing poison, and without notifying Nicholas that the bottles did contain poison.

The case was entered for trial at London, and upon its being called plaintiff asked for and obtained leave to amend her statement of claim by alleging that her deceased husband and her son were in the habit of buying whisky at defendant's drug store, and that Nicholas Antoine went on 4th November, 1906, for the purpose of getting whisky, and defendant sold, instead of whisky, a bottle of poison, that is to say, the bottle of Columbian spirits or wood alcohol, and that this was so sold without labelling the bottle or notifying Nicholas that the contents were poisonous, and that Nicholas, believing that the bottle contained whisky . . . , drank of the contents and gave to his son Job, with the result above stated. The trial was adjourned and the case transferred to St. Thomas.

There is not evidence sufficient to support plaintiff's allegation. The evidence put in by plaintiff is that Nicholas and Job were together on the day named near defendant's drug store; that Nicholas went into the store and came out; that Nicholas and Job, or one of them, had two bottles in an old house in or near St. Thomas. Evidence was given of what defendant said at the inquest, that he had on 4th November sold two bottles like those produced. He admitted that he sold two bottles of liquid, not as whisky, nor to be consumed as such, but to be used as a liniment.

The evidence of the Dockstaders was given with a view to discrediting defendant, but they did not testify to anything that was done on the day in question, or that would impute negligence or any wilful act of defendant which caused the death of either husband or son of plaintiff.

Certain answers of defendant upon his examination for discovery which were put in do not establish anything against defendant beyond a possible suspicion that if the deceased Nicholas was the person to whom defendant sold the liniment, he, being an Indian, might be tempted to drink a medicine or preparation consisting mainly of spirits.

Defendant called a witness named Kelitza Harris, who was present when defendant sold a bottle of liniment to an Indian on 4th November, 1905. From the account she gave of the transaction, I believe that Indian was Nicholas Antoine. She says defendant said to the Indian, "Be sure you don't drink this, it would poison you," and the Indian replied, "Me no drink it, me rub it," and by his motions indicated how and where he would rub. Mrs. Harris seemed a truthful woman. Her manner was good, her evidence clear. She gave a reason for remembering the day and circumstance.

Comment was made upon defendant not giving evidence. He was examined at great length for discovery; he gave evidence at the inquest. His counsel did not think it necessary to call him; I cannot say they were wrong.

This preparation is not one of those mentioned in the schedule to the Pharmacy Act, R. S. O. 1897 ch. 179, as one requiring to be labelled "poison."

As to Job, plaintiff did not shew that she had any pecuniary interest in his life. She had no reasonable expectation of any support from him, so far as appeared.

The action must be dismissed; defendant does not ask for costs.

BOYD, C.

DECEMBER 1ST, 1906.

TRIAL.

THOMSON v. MACDONNELL.

*Life Insurance—Assignment of Policy—Assignee for Value—
"Beneficiary"—Insurance Act—Identification of Policy
—Equitable Right—Creditors.*

Action by the assignee of a policy of life insurance, to recover the amount paid by the insurers upon the death of the assured to the defendant as trustee.

BOYD, C.:—There is no defence raised as to the policy not being assignable, or that it can only be assigned in some particular manner, or that delivery of the policy or notice of its being assigned before death should be proved. Defendant submits his rights to the Court—he holding the moneys which the company have paid, deducting a claim of the company which arose before notice of the assignment reached the insurance company.

The only matter to be considered is whether there has been in law, upon the above state of the pleadings, a sufficient assignment of the policy to entitle plaintiff to the balance of the proceeds held by defendant.

The statute R. S. O. 1897 ch. 203, sec. 151 (5), declares that nothing in the Act as to particular methods of assignment shall be held to interfere with the right of any person (insured) . . . to assign a policy for the benefit of any one or more beneficiaries in any mode allowed by law. "Beneficiary" is to include every person entitled to the insurance money, and the assigns of any person so entitled: sec. 2 (34.)

In this case the deceased person insured borrowed \$2,000 from the plaintiff, and as security gave him a writing under his own hand stating that "for collateral security I have placed aside and assigned to you a policy of insurance in the Standard Life Company for similar amount."

The policy now in question is for \$2,000, and is, no doubt, sufficiently identified by this description.

By this writing, which is operative as an assignment of the policy, I think plaintiff became as assignee "the beneficiary" for whose benefit the assignment was made, within the meaning of sec. 151 (5). The written assignment was for valuable consideration, and its effect, as against the deceased and his representative, is to pass the equitable right and title to the policy to plaintiff. Other creditors cannot claim as against plaintiff, for they can take no higher rights than the debtor himself had at the time of his death: *Neal v. Neal*, 2 C. & K. 672.

Judgment should go for the payment of the fund in hand to plaintiff, less defendant's costs to be taxed as between solicitor and client.

MEREDITH, C.J.

OCTOBER 26TH, 1906.

TRIAL.

INDEPENDENT CORDAGE CO. OF ONTARIO v. THE KING.

Crown — Contract — Inspector of Prisons — Employment of Prisoners in Manufacture of Binder Twine— Construction of Contract—Assignments of Contract—Extensions of Time — Modifications — Ratification of Original Contract by Resolution of Legislative Assembly — No Ratification of Assignments and Extensions—Effect of Resolution—Force of Act of Legislature—Authority of Executive Government of Province—Orders in Council—Change in Rates of Payment—Retroactivity—Commission — Interest — Insurance —Accounts.

Petition of right presented to the High Court of Justice for Ontario by the suppliants, an incorporated company, shewing:—

1. That one Patrick Louis Connor on 25th September, 1895, entered into an agreement in writing with the inspector of prisons and public charities for Ontario to manufacture binder twine in the cordage building at the central prison in the city of Toronto.

2. That Connor assigned all his interest in the agreement to one Field, by consent of the Lieutenant-Governor in council, and that Field subsequently, with a like consent, assigned all his interest in the agreement to the suppliants.

3. That Connor and Field carried out the terms of their agreement with the inspector, and all matters between the inspector and Connor and Field were settled and adjusted.

4. That in 1897 the cordage building at the central prison was destroyed by fire, together with the machinery for the manufacture of twine contained therein, and the manufacture of cordage was necessarily suspended for a period of more than a year.

5. That thereupon it became necessary, to provide new machinery for the operation of the plant, and on 28th October, 1898, a new agreement was entered into between the

inspector and the suppliants, which agreement was in writing, and was approved by the Lieutenant-Governor in council, and laid upon the table of the House of Assembly in due course.

6. That thereupon the suppliants, acting upon the terms of the agreement, advanced large sums of money for the purpose of purchasing and installing new machinery and plant, as provided by the terms of the agreement (to which the suppliants prayed to refer), and after the installation of such machinery continued the manufacture of binder twine and cordage from year to year until the termination of the contract on 1st October, 1905.

7. That by a further agreement dated 25th August, 1904, the agreement was extended for a further period of 5 years, upon certain conditions set out.

8. That by the last mentioned agreement it was provided that "if at any time it shall be deemed expedient to resume the plant on government account, the contract may be terminated by the inspector on 1st November in any year, by giving 6 months' notice thereof in writing."

9. That the inspector, presuming to act under this agreement, gave the suppliants notice terminating the agreement on 1st November, 1905.

10. That all matters of account between the suppliants and the inspector were adjusted in December, 1902, up to and including 30th September, 1902, and a balance was then shewn to be due and owing to the inspector on current account, of \$5,084.96, which amount was paid by the suppliants to the inspector in full settlement thereof.

11. That in 1903 the accounts were adjusted again up to and including 30th September, 1903, when a balance on current account, was due by the suppliants to the inspector of \$1,206.87, which amount was paid by the suppliants to the inspector and accepted in full satisfaction.

12. That in 1904 there was a similar settlement of account between the suppliants and the inspector up to and including 30th September, 1904, when a balance was shewn to be due by the suppliants to the inspector of \$674.89 on current account, which amount was paid by the suppliants to the inspector and accepted by him in full settlement.

13. That the suppliants operated the cordage plant from 30th September, 1904, until 1st November, 1905, and there was due by the suppliants to the inspector on current account, in respect of such operation during that period \$1,686.42.

14. That the settlement in 1902 shewed a balance due by the inspector to the suppliants in respect of advances made for the purchase of machinery, plant, etc., of \$30,705.71.

15. That the settlement in 1903 shewed that the inspector was indebted to the suppliants in respect of such advances in \$26,319.75.

16. That the settlement in 1904 shewed that the inspector was indebted to the suppliants in respect of such advances in \$17,910.68.

17. That the balance which the suppliants were entitled to on 30th September, 1905, in respect of such advances, amounted to \$9,903.10.

18. Deducting from the balance of \$9,903.10, the sum of \$1,686.42 due by the suppliants to the inspector on current account, leaves the inspector indebted to the suppliants in the sum of \$8,216.68.

19. That the suppliants, under the terms of the agreements referred to, deposited \$5,000 in the Canadian Bank of Commerce, Toronto, to the credit of the inspector and the Provincial Secretary, as a guarantee to insure the performance by the suppliants of the terms of the agreement.

The prayer of the petition was that the suppliants might be declared entitled to receive the balance of \$8,216.68, with interest from 30th September, 1905, and the sum of \$5,000 with accrued interest, and costs of suit.

The Attorney-General for Ontario, on behalf of His Majesty, delivered a statement of defence and counterclaim as follows:—

1. All admissions made herein are made for the purposes of this suit only.

2. The Attorney-General for Ontario, on behalf of His Majesty, admits the statement contained in paragraph 1 of the petition of right, the agreement of 25th September, 1905, being as follows (setting it out.)

3. This agreement was duly ratified by resolution of the Legislative Assembly of Ontario on 26th March, 1896, such resolution being as follows: "That this House doth ratify an agreement laid before this House by command of His Honour the Lieutenant-Governor, bearing date the 25th day of September, 1895, and expressed to be made between the inspector of prisons and public charities and Patrick Louis Connor regarding the manufacture of binder twine in the central prison."

4. By the terms of the agreement and its subsequent ratification the same became and was in all respects an agreement between the respondent and Connor, of the same force and effect as if it had been embodied in a statute of the province of Ontario, or had been entered into by the respondent in pursuance of and in strict conformity to a statute of the said Assembly, and the same became a contract binding upon the Crown with the privity and consent of the said Assembly.

5. The Attorney-General for Ontario submits to this Court that the same could not be altered, amended, varied, or added to, by any act of the Crown, unless and until the same had been authorized by a similar privity and assent of the said Assembly.

6. The assignments mentioned in paragraph 2 of the petition are, if the same were made with the assent of the Lieutenant-Governor in council, and only in so far as they were merely assignments of the said original contract, admitted by the Attorney-General for Ontario for the respondent.

7. The Attorney-General for Ontario alleges that the said assignments merely transferred to the several assignees the rights and obligations of Connor, unaltered and unaffected by any act of the inspector or any act of the Crown unauthorized by the terms of the original contract.

8. The Attorney-General for the respondent admits the occurrence of the fire alleged in paragraph 4 of the petition of right, and that manufacture under the original agreement was suspended for about the period mentioned, but denies that the fire altered in any respect, with regard to machinery or otherwise, the relations of the Crown and the contractor. The machinery alleged to have been put in by the suppliants

was the rope-making machinery provided for in paragraph 4 of the original contract, and was paid for by the Crown.

9. So far as the agreement of 28th October, 1898, alleged in paragraph 5 of the petition, merely gave effect to the provisions of clause 4 of the original agreement, and did not alter, vary, or depart therefrom, but no further, the respondent is content to be bound thereby.

10. The Attorney-General for the respondent denies the extension of the agreement alleged in paragraph 7 of the petition, except so far as the same could and did operate under clause 14 of the original contract, and further says that the extensions could not and did not take effect till 1st October, 1900.

11. The Attorney-General for the respondent denies the statement contained in paragraph 9 of the petition, and alleges that the agreement then in force, namely, the original contract, was duly terminated pursuant to the terms of the same.

12. The Attorney-General for the respondent denies the adjustments, settlements, and balances alleged in paragraphs 10, 11, 12, 13, 14, 15, 16, 17, and 18 of the petition, or that the same were valid, legal, or binding on or due from the Crown, or that payments therein alleged were made by or with due authority, or that they are binding upon the Crown.

13. The Attorney-General for the respondent denies that any sum whatever is due to the suppliants, and asks that the petition be dismissed with costs.

By way of counterclaim the Attorney-General for the respondent, repeating the allegations aforesaid, alleges that there is due by the suppliants to the Crown, upon a proper taking of accounts under the original contract, and unaffected by the allowances, charges, and changes purporting to be given and made under unauthorized and illegal orders, adjustments, and alleged settlements, and alleges that the suppliants obtained and used the services of prisoners in the central prison in excess of the number to which they were entitled under the contract, without paying or allowing for the value of their services \$69,844.03, and is willing to allow against the same the \$5,000 referred to in paragraph 19 of the petition, and the sum of \$13,025.79, being the actual cost of the manufactured and unmanufactured material on

the prison premises used in the manufacture of binder twine pursuant to paragraph 8 of the original contract, and there remains due by the suppliants to the Crown \$51,818.24, for which the Attorney-General for the respondent claims judgment with costs.

The suppliants delivered a reply in which they alleged that by an order in council approved by the Lieutenant-Governor on 27th May, 1902, it was provided: first, that the charge to the contractor for repairs in keeping the twine and cordage machinery in running order, be at the fixed rate of \$1.25 per ton on gross output of the factory; second, that the charge made against William Field for silent time during the term of his contract be remitted; third, that the contracting company continue to be charged on the gross weights of the factory products, as they are put up and prepared for shipping; fourth, that any charges made against William Field during the term of his contract for shortage on the daily output of 4 tons per day be remitted, and that no charge be made against the contracting company for such shortage, should any have occurred, until after 1st June, 1901. The suppliants denied that they were indebted as alleged by the respondent, and asserted a lien for the balance claimed in the petition upon the machinery supplied at the request of the respondent.

The agreement of 25th September, 1895, was made between the inspector of prisons and public charities for Ontario, called "the inspector," for and on behalf of Her Majesty, by virtue of sec. 30 of the Act respecting the Central Prison, of the first part, and Patrick Louis Connor, called "the contractor," of the second part, and was in part as follows:—

1. The government of the province of Ontario shall provide a cordage plant with the main line shafting in the cordage building maintained in motion, as now installed at the central prison of Ontario, but made equal to a capacity to turn out 4 tons or over of binder twine per day of 10 hours, running 550 feet to the pound, and prison labour to operate it, taking the material as it enters and until it leaves the prison, but limited to an average of not more than one prisoner for each 130 pounds of twine made for all purposes, the prisoners supplied to perform the labour to be able-bodied men, who, after having entered on the work, shall

continue in the employment till the expiration of their respective sentences.

2. The government shall give to the contractor the use of the following portions of the central prison: the general railway facilities of the prison; the main room in the basement under the broom shop for storage of twine, fibre, and supplies; the whole of the cordage ship, except the rooms on the ground floor at the north end, etc.; the use of all machines contained in the said cordage shop for manufacturing binder twine.

3. The contractor, for himself, his heirs, executors, administrators, and assigns, hereby agrees: first, that he will, commencing with the pulleys on the main line shafting which transmit power direct to each distinctive machine, and at his own cost, keep all belting and machinery in good repair, being granted for this purpose the facilities of the prison machine shop, to be used with prison labour only, but to pay at the rate of \$1 per day for the prison labour, which shall include the use of machinery and tools; second, at all times, at his own cost, to provide all expert labour and instructors necessary in manufacturing, and to supervise and instruct the prisoners in the work required of them in operating the plant, and likewise to provide and deliver to the central prison cordage shop all material necessary, and to manufacture from manilla hemp, or from such other fibre as the inspector and contractor may agree upon, not less than 4 tons of twine on each working day that the full ratio of prisoners specified are provided; third, to pay for all twine and rope manufactured under the provisions of this contract the sum of 82½ cents per 100 pounds on the gross weight of the bales or coils of twine or rope as it comes from the machine, and to pay the amount to the bursar of the central prison on the 20th day of each month as the account is rendered therefor. . . .

12. If at any time it shall be deemed expedient to resume operating the plant on government account, the contract may be terminated by the inspector on 1st November in any year, by giving 3 months' notice thereof in writing, and by paying the actual cost of any merchantable binder twine in stock made under the contract, and for unmanufactured stock useful in the manufacture of good merchantable binder twine, then on hand at the expiry of the notice,

with 10 per cent. advance thereon, but no addition shall be made to the unmanufactured stock after the serving of the said notice, except as may be required to keep the plant in operation for a period not longer than 30 days after the date for terminating the contract.

13. The contractor shall take over at cost all the manufactured twine and binder twine material on hand at the time of entering upon the contract; the twine at a price to be arrived at the same as is provided in making up the selling price of twine by the contractor, and the unmanufactured material at invoice prices with cost of delivery at the prison added.

14. This contract shall, subject to the herein contained provisions as to default and resumption by the government, be in force from 1st October, 1895, until 1st October, 1900, renewable for a further period of 5 years, provided the Lieutenant-Governor in council considers it in the public interest that such further period should be granted. . . .

17. The contractor shall not assign this agreement or sublet the same without the consent of the Lieutenant-Governor in council.

18. It is distinctly understood that this agreement is not entered into by the inspector in his personal capacity, but is binding upon him and his successors as a corporation sole by virtue of sec. 38 of R. S. O. 1887 ch. 238.

19. It is expressly agreed that this contract and everything therein contained shall be void and of no effect unless the same is ratified by resolution of the Legislative Assembly of Ontario at its next session; and should there be a failure to ratify, all material as provided by clause 12 hereof then on the prison premises belonging to the contractor shall be taken over by the inspector.

Provided always that anything obtained or done under the said contract shall nevertheless be paid for in accordance with the terms hereof.

The agreement was under the hand and seal of Connor and under the hand and corporate seal of the inspector.

The cause was tried by MEREDITH, C.J., without a jury, at Toronto, on 25th and 26th October, 1906.

G. C. Gibbons, K.C., and C. A. Moss, for the suppliants.

F. E. Hodgins, K.C., for the respondent.

MEREDITH, C.J. (at the conclusion of the evidence and argument):—This case has been argued upon what is the rule as to Parliamentary practice, and as to the undoubted rule that no money can be paid out of the consolidated revenue, except after its appropriation by Parliament for the particular purpose. With those considerations I have nothing to do in this case; I have simply to determine whether, upon the facts as proved, there is a liability on the part of the province to the suppliants, and it will remain open to the executive and Parliament to take such action with regard to that as in their judgment may seem proper. As I understand that matter, any answer of the Court would be wholly inoperative, so far as any payment to the suppliants of the amount found due is concerned, unless Parliament shall appropriate the money for that purpose.

It is not necessary, I think, for the purpose of the case, to determine whether Mr. Hodgins's argument that the original contract with Connor, having been ratified by vote of the Legislative Assembly, had the force of an Act of Parliament, is sound or not.

The circumstances under which the contract of 1898 were entered into were these. The Connor Company had a contract which had not then expired. In some way both gentlemen who were ultimately interested in this incorporated company, who are the suppliants, had made arrangements for taking over this contract and the benefit to be derived from it. A person by the name of Field, acting for the promoters of the company, had been admitted. Connor had gone out, and Field had been admitted to carry on the business. He had carried it on for several months, and ultimately the company was incorporated.

Now, it is to be borne in mind that there was no obligation on the part of the province to enter into this contract. They were in no way bound to confirm any contract between these parties. It is therefore, I think, obvious that that agreement must be treated as a new one between the new partners, incorporating, it is true, most of the provisions of the old agreement, but modified to some extent. It would be an extraordinary thing morally that where a number of persons in the position of promoters of this company enter into negotiations with the government, upon the faith of which, according to the evidence of Mr. Hobbs, they under-

take obligations which they would not have entered into but for the new agreement—the modifications (as they are called) of the old agreement—it is obvious, it seems to me, that it would be impossible to say that it would not be unjust that the government should recede from the agreement that was then entered into. Therefore, I think the case is not one in which any difficulty (if there be any difficulty at all) would arise by reason of the original agreement having been sanctioned by the House, and therefore, as Mr. Hodgins contends, having the force of an Act of the legislature.

Then, if that be so—if this is to be treated as a new agreement—I have no doubt whatever that it was within the authority of the executive government of the province. The government had charge of this prison. It was part of the policy of the province that the prison labour should be utilized. One of the very objects of the erection of the prison was to avoid what had taken place in the past—prisoners idling in the county gaols — and to provide a place where their labour should, to some extent, at all events, be made remunerative, and relieve the general public from the burden of their maintenance. Therefore it seems to me that it was completely within the authority of the executive government to enter into such an agreement as the first agreement with Connor, and the second also, although the ratification by Parliament was in no sense necessary to give contractual validity to the document. It was, no doubt, submitted to the Assembly, because it was an important part of the administration of the public service of the country, and the government should be desirous that Parliament should state its approval of the kind of policy that it was adopting, before that policy was given effect to. Therefore this agreement provides that it shall not go into operation until it has been submitted to Parliament. Parliament has ratified its terms. Then, if I am right in that view, it gets rid of all the difficulties in the case raised by the Crown except those relating to the orders in council.

I am entirely unable to follow the argument of counsel for the Crown with regard to that matter. If it was competent for the Crown to make the agreement, surely if in the working out of that agreement it became, in the judgment of the advisers of the Crown, desirable that modifications should be made in the terms of the contract, it was within the

power of the executive government to make those changes. It is not necessary, in the view I take of the contract, to say anything further on that question, but it seems to me that, even if this agreement had the effect of a contract—if, in working out its terms relating to the repairs (which provided, it is true, that the repairs should be borne by the contractor, but also provided that they should be done in the central prison and done by the prisoners, the materials and the prisoners' time being charged for), it was found that, according to the report of the inspector, it caused friction, and was very difficult to carry out—it was competent for the Crown and the contractors to modify it. In the course of the discussion of the case it had been pointed out that there is a great deal of difficulty in determining what the exact meaning of the language is, it being that the materials are to be paid for and charged for at the rate of \$1 per day for the prison labour. As I understand it, although it does not appear in the inspector's report that that was dealt with by him, the view of the contractors was that that meant \$1 for all the prisoners that were employed, and that the view on the other side was, that it was \$1 per day for each prisoner who was employed in making these repairs. I think it was perfectly competent to make that modification in the detail of the agreement, not altering the essential terms of it at all, still leaving the contractors to bear the expense of the repairs, relieving the province of the necessity of keeping track, in the way it had been doing, of the materials and of the prison labour, and of the conflicts and disputes as to the amount of time and the amount of material employed, and possibly too, as the evidence indicates, as to what came within the definition of the term "repairs." There was then substituted for that arrangement a provision by which, in lieu of the one I have just referred to, the contractors were to pay a dollar and a quarter for each ton of the output of the factory.

I may as well refer at this point to another position taken by Mr. Hodgins; that the provision with regard to that was not retrospective. The evidence is, that, after that modification was provided for, instructions were given to the central prison officers to recast the accounts from the beginning on that basis, and that was done. Whether, on the construction of the document, that was its meaning, it is not necessary to consider. That arrangement was made,

and the transaction was carried out on that basis between the parties, and it is now entirely too late to raise the objection and ask that all that has been done should be reopened and changed.

Objection is taken to the item of commission. It appears that under the terms of the agreement machinery was to be purchased. The contractors, the suppliants, were directed or authorized by the government to purchase the machinery required for the use of the factory which was being leased, or which it was permitting the contractors to use in the central prison, and it was agreed that there should be paid to them 5 per cent. as a commission for their trouble and expense in arranging and looking up the machinery and in making the contracts for it. I have no doubt from the evidence that that was a fair and reasonable agreement. The amount was but a few hundred dollars, perhaps \$300 or \$400 more than it was sworn was actually expended for travelling, to say nothing of the time which was employed in travelling throughout the United States and in Europe making investigations with a view to securing the best kind of plant for the purpose required. It is true that there is nothing in the contract that says, that that is to be paid for by the Crown ultimately. The provision is as to the cost. Surely it is no violent straining of the language of the agreement to include 5 per cent. that was paid to W. R. Hobbs & Co.—not charged by the suppliants themselves—as part of the cost of the purchase of the machinery.

Then there is objection taken also to the charges that have been made, and have been allowed in respect of the expenses of Berry and those of some others who were employed, as the parties treated them throughout the accounts, in the installation of the new plant. I think that objection entirely fails also. Upon the evidence it was necessary that an expert should be got from abroad. Possibly the government might not have succeeded in getting the expert the suppliants got. They had such relations with the Plymouth Company, the largest manufacturers, it is said, on this side of the water, at all events, in this line of articles, that they were able to get from them the services of one of their employees, and to get (although this does not bear upon this branch of the case), free of charge, specifications for the new machine. A man of the name of Berry was em-

ployed at \$4 a day, and, according to the testimony of Mr. Hobbs (which is uncontradicted), during the whole of the time that he was there, and for which his salary has been charged, he was looking after the installation of the machinery. It is pointed out that the installation of the machinery did not mean simply the fastening of the machines (if they had to be fastened), but castings had to be made from a wooden model, and complicated arrangements had to be made for the purpose of enabling the plant to be put in proper running order. There is nothing that I heard that would justify the disallowance of any part of the charge that is made for the disbursements to Mr. Berry, and nothing has been adduced which would justify, I think, even if it were open to me to do so, the charges in respect of the other persons who were employed about the same job.

Then objection is taken to two other matters that are not covered by the terms of the agreement or by any order in council. One is the question of interest. It is said that interest has been charged on one side, and has not been allowed upon the other, and that there should have been a considerable credit on interest account to the province. The exact amount appears from the statements which Mr. Brown, one of the officers of the audit department, prepared for a calculation made by him. It is a sufficient answer to that position, I think, to say that interest is not something that the parties are entitled to as of right. The question, under our statute, in transactions between party and party where it is payable is whether the money in respect of which it is charged is payable upon a particular day, and on certain other circumstances not applicable to this case. And also it is usual for a jury to allow interest. Now, in this case the practice throughout in the transactions between the parties was not to compute the interest in the way the Crown now seeks to have it computed. The provincial auditor did not deal with the accounts on that basis. I think it is impossible to say that that can be undone, and a charge for interest, such as the Crown now seeks to make, can be allowed.

With regard to the item of insurance, there accompanied the agreement a memorandum written by Mr. Dewart, who was acting for the company, in which he pointed out

that there were certain matters which were understood between the parties and not embodied in the agreement, and he desired to have an assurance from the inspector that they were matters that were arranged between the Crown and the contractors, although they were not inserted in the agreement. One of these was a provision that there should be insurance upon joint account. Now, the machinery that was purchased and put into the prison by the contractors had been insured, and the premiums of insurance had been from time to time allowed in the settlement between the officers of the Crown and the contractors. It was argued by Mr. Hodgins that there was no right to make that settlement—that the property was really the property of the contractors — that it was an insurance for their benefit. I think that is altogether too narrow a view to take of it. Although in form it was their property, although in form they had purchased and the government was to re-purchase, yet the transaction was in substance an advance by the contractors of the money required to purchase the machinery. The province paid 6 per cent. interest upon the amount from time to time remaining due on account of the purchase money by deducting certain payments which had been made depending upon the output and in reference to a probable output. Substantially, I think, that was a purchase by the government, and it was certainly not inequitable that the insurance upon that property should be borne by the government. It was not a thing that would wear out in the time during which the agreement was to be on foot; it was something of a permanent nature; and it would be necessary for the government to have it after the agreement came to an end, in the event of its continuing the work or making with others a similar contract. The government throughout has recognized that right. It has allowed the contractor that insurance in all the accounts that have been passed. It is entirely too late to raise an objection to that item.

The observation I have made with regard to the interest and the insurance are applicable to the other matters.

Accounts were furnished from time to time and balances struck. Not accounts simply furnished by the Cordage Company and accepted by the government, but accounts were furnished, and, after proper checking, entered in the

books of the central prison. These were treated as the accounts between the parties, as evidencing the condition of matters, and the substance of what was done was that the disbursements which are now attacked, which the suppliants were making, were periodically settled by the Crown by the deduction of them from the gross indebtedness on account of the rental (if it may be so called) which the suppliants were to pay. Even in the case of private individuals it would be impossible to disturb a transaction of that kind—no fraud, no concealment, the persons acting at arm's length—and it seems to me an extraordinary proposition to ask the Court to review the discretion which has been exercised by the Crown in regard to these matters, and to substitute its own view of what ought to have been done under the circumstances.

I have nothing to do with the policy of these matters. That is a matter that is wholly outside of this inquiry. These are matters for the executive government of the province to deal with. The remedy, if anything was wrong, is to be found by Parliament acting, and ultimately by going to the final court of appeal—the people of the province.

I think that disposes practically of all the matters that have been discussed except the matter of a payment for prisoners in excess of those that, under the terms of the contract, the contractors were entitled to, and who were engaged in the work. By the terms of the contract each prisoner would turn out 130 pounds in a working day. Of course, if that had been found practicable, the result would have been that a much less number of men would have been required for the purpose of turning out the output which went from the work. But it is manifest from the correspondence, and from the evidence of the inspector, that at the outset it was found it was entirely impracticable to get prison men to do that amount of work, and deductions were made from time to time, with protests on the one side by the inspector, and demands on the other from time to time for more men. It never occurred to anybody that any charge should be made in respect of the additional men. That item of the claim was not very strenuously opposed by Mr. Hodgins, I fancy. He appealed to some very general words of the agreement; but it seemed to me that he had not very much faith in that branch, at all events, of the claim which

has been set up. I think it is impossible to come to the conclusion that those general words amount to a covenant—an agreement entitling the Crown to be paid for the additional men at the rate of 50 cents per day or at any other rate—and that the circumstances entirely rebut any inference that there was an implied contract on the part of the suppliants to pay for the service of the additional men on a quantum meruit.

Now, while I have said it is not necessary, in my view, to determine the large legal question which has been argued by Mr. Hodgins, and argued very ably, still I have a very strong opinion upon the point, and, if it were necessary for the determination of the case, I would not hesitate to determine it upon that opinion.

I entirely disagree with the view that the assent by the House of Assembly to the contract, or the resolution of the House ratifying the contract, made the contract or gave to the contract the force of a statute of the province. It may well be, although you may have to search in ancient times to find them, that there are instances of Acts of Parliament where the assent of the Crown has preceded the action of the other constituent bodies in the legislature, instead of their following it, as is the usual practice. Well, it would be straining the line of decisions upon which Mr. Hodgins bases his argument to apply them to what has been done in this case. There was no idea of passing an Act of Parliament. The forms of procedure which are adopted in the passing of an Act were entirely omitted. A bill is introduced and read three times. It has to pass through all these stages before it finally becomes the ultimate action of the Assembly. Nothing of that kind was done here. The contract is laid upon the table of the House. Notice of motion is given that upon a certain day the Minister in charge will move a resolution approving of and ratifying the contract. I do not think this had any of the elements at all of an Act of Parliament, and, as I have said, there was no intention on the part of anybody that it should have. It was simply an assent—not constitutionally necessary, I think—an assent on the part of the Assembly to a contract which the executive government of the province had entered into, and had stipulated should not become operative until that assent had been obtained.

Nor am I able to agree that, even if the resolution had the effect for which Mr. Hodgins contends, it would not have been open for the executive government to have modified the terms of the agreement. I think it is impossible to come to the conclusion that with an agreement such as that, covering a period of years in which the working out of it might shew that modifications in minor details were necessary, or where, as did happen, the machinery might be destroyed by fire and new conditions arise, the whole of the machinery of the central prison, as far as this industry was concerned, was to be paralyzed until the legislature could be called upon to deal with the matter.

Although the argument *ab inconveniente* is always a strong one, I simply mention that incidentally. I think it was quite open to the executive government to make the modifications they did make.

It is also to be observed that although, as Mr. Hodgins very properly pointed out, it was an option that the contractors had to supply the additional machinery, they had to supply it at their own expense under the terms of the contract. But what if the time arrived when the contractors said, "Although we have this option we are not going to exercise it, but it is in our interest and in your interest that this additional machinery be installed?" Were matters to stand still? Was there to be no power in the executive government to enter into an agreement by which that could be done? I think not. I think, if the argument that has been adduced on the part of the Crown in this case were given effect to, the executive government would be shorn of many powers that, in my judgment, it possesses, and be very much hampered in carrying on the business of the province.

I repeat I have nothing to do with discussing the question of the policy, or whether the agreement was a judicious agreement to enter into. These are matters for the legislature and the people, not for the Court.

Judgment was pronounced declaring plaintiffs entitled to payment of the full amount of their claim with interest and costs, and dismissing the counterclaim with costs.

SCOTT, LOCAL MASTER.

NOVEMBER 28TH, 1906.

CHAMBERS.

CAMPBELL v. CLUFF.

*Parties—Joinder of Defendants—Cause of Action—Pleading
—Negligence.*

Motion by defendants the Corporation of the City of Ottawa, for an order requiring plaintiff to elect against which of the defendants he will proceed.

The case set up by the statement of claim was that the defendants the Cluffs were the owners of the Gilmour Hotel which was destroyed by fire on 14th September last, leaving the front wall, abutting on Bank street, standing to a height of 40 feet, and on 9th October this wall fell to the street, injuring the plaintiff, who was lawfully travelling along the street.

Paragraphs 7 and 8 read as follows:—

7. The defendants were well aware of the dangerous condition of the said wall, and of the fact that its condition rendered the said street or highway unsafe for travel and out of repair, but, nevertheless, wrongfully and negligently permitted the said wall to remain in the condition as aforesaid, and the said street or highway to remain out of repair.

8. Under and pursuant to a by-law of the defendant corporation known as by-law 1079 (and certain amendments thereto) the defendant corporation had power, by its duly appointed officers in that behalf, to take down and remove the said wall, and to put the said street or highway into a proper state of repair, and the defendant corporation was in duty bound to do so, but, notwithstanding the said by-law and its duty as aforesaid, the defendant corporation wrongfully and negligently permitted the said wall to remain standing as aforesaid."

A. E. Fripp, Ottawa, for defendant corporation.

W. Greene, Ottawa, for defendants the Cluffs.

G. F. Henderson, Ottawa, for plaintiff.

THE LOCAL MASTER:—With the question of whether or not as a matter of law a good cause of action is shewn, I have nothing to do. It will be seen that what is complained of is that defendants—all the defendants—wrongfully and negligently permitted the wall to remain in a dangerous condition. It is assumed to have been the duty equally of the owners and of the corporation to have removed it, though the duty is rested in each case on a different basis. The Cluffs are said to be liable as owners of the property, presumably on the principle of *Rylands v. Fletcher*. The alleged liability of the corporation is put on two grounds, first, non-repair of the highway, and, secondly, a duty said to have been assumed by the passage of the by-laws referred to.

I have carefully examined all of the numerous cases cited on the argument. Cases of the class of *Sadler v. Great Western R. W. Co.*, [1895] 2 Q. B. 688, [1896] A. C. 450, *McGillivray v. Township of Lochiel*, 8 O. L. R. 454, 4 O. W. R. 193, *Hinds v. Town of Barrie*, 6 O. L. R. 656, 2 O. W. R. 995, and *Grandin v. New Ontario S. S. Co.*, 6 O. W. R. 553, where the parties sought to be joined were alleged to have been guilty of separate and distinct acts, which combined either to bring about or to augment the damage, have no application, nor do either cases against directors and their companies or cases arising out of contracts afford much assistance. The case most near in circumstances to the present one is *Bain v. City of Woodstock*, 6 O. W. R. 601; but I think there is a clear distinction between the two. There, as pointed out by the Master, the wrongful placing of the lumber on the highway by the Patricks, and the breach of their statutory duty to remove it on the part of the corporation, were not only quite distinct causes of action, but did not even arise at the same time. Here the act, or rather omission, complained of, on the part of the Cluffs and of the city corporation, is identical, though the duty in the one case depends on a different principle from that in the other. In *Hinds v. Town of Barrie*, 6 O. L. R. 656, at pp. 661-662, Mr. Justice Osler, after pointing out that the language of the Rule is embarrassing and calculated to mislead a litigant and to promote delay and expense, says: "Probably the phrase 'cause of action' is not to be strictly read in its former technical sense, so that where persons have

been parties to a common act which has caused damage to the plaintiff, they may be joined in the same action, though the nature and extent of the relief to which he may be entitled against them is different." Here the causes of action, though technically different, are practically identical, and the nature and extent of the relief sought is also identical. If the words of Mr. Justice Osler have any application at all, it must be to a case like the present.

The motion will therefore be dismissed, but, as the practice is by no means clear, the costs should, I think, be in the cause.

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MEREDITH, C.J.

NOVEMBER 21ST, 1906.

WEEKLY COURT.

RE LEAHY AND VILLAGE OF LAKEFIELD.

Municipal Corporations—Local Option By-law—Motion to Quash—Objections—Voting—Notices—Character of Type—Posting—Public Places—Tenants Voting without Right—Effect on Majority—Refusal to Swear Voter—Undue Influence—Bribery—Coercion—Boycotting—Proof of Offences—Promise to Erect Building in Village.

Motion by one Leahy, a ratepayer, to quash a local option by-law of the village of Lakefield.

D. O. Cameron and O. A. Langley, Lakefield, for the applicant.

W. E. Raney, for the village corporation, was not called upon.

MEREDITH, C.J.:—I do not think it is necessary to hear you in this case, Mr. Raney. I think all the objections to the by-law fail.

The objection to the notices that they were put in too small type and not posted in 4 of the most public places, as required by sec. 338 of the Municipal Act, is not made out upon the material. The evidence shews that notices were put up in 6 places, and the evidence in opposition to the application says that they were put in the places which were the most public.

It would be a most unfortunate thing if the Court was to set aside a by-law simply because the notice was not written in large enough characters or printed in large enough type; and that where there has been a substantial compliance with the Act, and an honest intention to put up the notices in four of the most public places, the Court should interfere with what had been done and set aside the by-law because, on a hypercritical examination of the circumstances, it might be found that one of these places was perhaps not to be included in the category of being one of the most public places.

The objection must be overruled.

Then with regard to the other, which is the only substantial ground of objection. There was a majority of 41 in favour of the by-law, out of a vote of 323. It is said that 5 tenants voted who had no right to vote, because they had not been resident within the municipality for one month before polling day. That is not controverted, and no doubt these 5 tenants improperly voted, and if a sufficient number of such tenants to have affected the result had voted, although it is impossible to tell which way they voted, it would have been necessary to set aside the by-law. However, if all the 5 votes were struck off, that would result only to reduce the majority to 36.

I think the refusal to swear one voter, Miss Graham, is not made out upon the material; and, even if it were, I should not think that would be a ground for quashing the by-law.

Then with regard to the undue influence, bribery, coercion, and boycotting, which is alleged to have been shewn, it has to be borne in mind that a by-law such as this differs very much from an electoral contest.

In an electoral contest the candidate, in promoting his own election, one may say, is a party, and he is affected, of course, by his own acts and by the acts of his agents which are in violation of the law.

In the case of a by-law which is submitted to the electors for the voting yea or nay upon it, the laws applicable to elections of members of a municipal council or a Legislative Assembly do not obtain, and therefore it is provided by sec. 381 that "any by-law the passage of which has been procured through or by any means of any violation of the provisions of secs. 245 and 246 of this Act, shall be liable

to be quashed upon an application made in conformity with the provisions hereinbefore contained."

That is the authority which is conferred upon the Court to quash a by-law upon a summary application; and, as has been seen, if, by means of a violation of the two sections referred to, the passing of the by-law has been procured, the Court may quash the by-law.

Now, turning to secs. 245 and 246: sec. 245 deals with and defines bribery, and sec. 246 defines undue influence.

The only class of acts charged which would come within sec. 246 is the alleged boycotting, and I am not satisfied upon the evidence that boycotting is made out.

The affidavit of Mr. Manning has not been drawn in such a way as to lead one to the conclusion that it can be relied upon. It is not a fair affidavit. He does not put forward anything which the opponents of this application, the supporters of the by-law, could answer. The general allegation that he has heard persons supporting the by-law make certain statements as to withdrawing trade, and his belief that that influenced voters, even though there had been no direct contradiction of it, is an unsatisfactory way of proving the charge made, and I am unable upon that evidence to come to the conclusion that acts in the nature of a boycott, such as to justify the quashing of the by-law, are shewn to have been committed.

In regard to the alleged bribery, it is said that the Rev. Mr. Campbell, in supporting the by-law, made statements, and that others made statements, publicly and to individual voters, that the temperance party, as it is called—those who were promoting the by-law—had provided a fund of some thousands of dollars with which they intended to erect, in the event of the by-law being passed, a building to be used as a temperance hotel, and that in connection with it there would be stables free for the use of those desiring that accommodation, and that there would also be in connection with the hotel a free reading-room and games.

Now, assuming all that to be proved—there is no contradiction of it—one must look at what the character of the voting was, and what the question before the electors was; and one, at the threshold, will see that the argument upon the one side would probably be: If you pass this by-law, you are going seriously to injure the business interests of the

town; when, as has followed the passing of such by-laws in other places, the taverns are closed, farmers will not come here, and so you will be directly injuring yourselves by passing such a by-law. Apparently, the temperance party, who were interesting themselves in having the local option by-law passed, had from their friends secured a sum of money which they intended to apply, in the event of the by-law being passed, in a certain way, that is, the way already mentioned. Now, all that was done was to make public the fact that that fund was ready to be used in the event of the by-law being passed. There was no other purpose for the fund. That distinguishes the case very much from the cases which have been relied upon by counsel for the applicant.

Possibly it may be said that it was not a legitimate argument to be used; I do not know that it can be said even that what was done was ethically wrong, and I certainly think it cannot be said it was bribery. There was no personal advantage promised to any one. At the most only an indirect advantage would be derived by persons living within the municipality from having such an hotel within its limits, with the free facilities that were intended to be provided in the event of the by-law being passed.

I do not think any of the cases require me to hold that what was said constituted bribery.

It was not any benefit to any individual voter. The argument was that the passing of the by-law would be a financial benefit to the whole community; but, even if technically that comes within the provisions of the statute, I think the applicant has failed to make out a case within sec. 381.

I am not at all satisfied that the by-law was procured by means of any such statements or promises.

As I have already pointed out, the majority in favour of the by-law was 41, from which there are to be deducted 5 tenant voters, leaving 36.

After searching the whole of this village, all that the applicant has been able to procure is an affidavit—not from electors who say they were influenced—but from a man who probably was an active opponent of the by-law, who says that two persons told him that they were influenced by the promises made by the promoters of the by-law.

I think the applicant has not satisfied the onus, resting upon him under the section, to shew that this by-law was procured by the promises, if these were promises amounting to bribery, within the meaning of sec. 245.

The application therefore fails and must be dismissed with costs.

CARTWRIGHT, MASTER.

DECEMBER 3RD, 1906.

CHAMBERS.

WOODRUFF CO. v. COLWELL.

*Pleading—Counterclaim—Motion to Strike out—Irrelevancy
—Company—Parties—Joinder of Plaintiffs—Costs.*

Motion by plaintiffs to strike out defendant's counterclaim.

W. E. Middleton, for plaintiffs.

C. A. Moss, for defendant.

THE MASTER:—The main facts of this case appear in a report of a previous motion, ante 302. On 12th November the statement of claim was delivered. The relief asked for is to have defendant restrained from acting as manager of the plaintiff company or dealing in any way with their assets, and to have him deliver over the books and documents and assets of the company, and account for his dealings with the same, and for damages sustained by the company through defendant's alleged misconduct.

No relief of any kind is asked by the Woodruffs personally. The point was not raised on the argument; but I do not see why the Woodruffs joined as plaintiffs. No doubt, in this way they give the best proof of good faith, as they thereby render themselves liable for costs and to give discovery. But having control of the company, on whose behalf they allege that the action is brought, it would not seem necessary to have had individual plaintiffs. See *Saskatchewan Land and Investment Co. v. Leadley*, 4 O. W. R. 39, 378; *International Wrecking Co. v. Murphy*, 12 P. R. 423.

On 27th November defendant delivered his statement of defence, together with a counterclaim, which does not ask any relief against the company, who are not made parties to it. It is directed solely against the Woodruffs, and is based on an agreement made between them and defendant in April last. Defendant asks a declaration that he is entitled to the 55 shares held by them; that the agreement may be rectified if necessary, to conform to the true agreement of the parties; and that the Woodruffs be restrained from further intermeddling or interfering with defendant in the management of the company's affairs.

All the plaintiffs have moved to strike out this counterclaim.

For the motion it was pointed out that the action was really one by the company, and is brought not by the Woodruffs personally, but as members of a class. Counsel relied on *Macdonald v. Carrington*, 4 C. P. D. 28, and *Stroud v. Lawson*, [1898] 2 Q. B. 44, which latter case shews that the Woodruffs could not bring an action on behalf of the whole body of the shareholders and unite with it a claim made by them personally. From this it would follow that the counterclaim would be improper; or else the defendant should have moved against the statement of claim. On the other hand, it was contended that the real controversy is between the Woodruffs and Colwell, the question being, who is entitled to the control of the company?

Assuming that this is so, it does not follow that this question can be decided in this way. The 5th paragraph of the statement of defence seems to set up the same matter, as it denies that the Woodruffs "are stockholders or directors, or that they have any status or right to interfere in the management of the said company." But, as no facts are there stated as supporting this contention, the meaning may be different. If it is the same contention that is made by the counterclaim, then it will be before the Judge at the trial, who will give such effect to it as may be proper after hearing the plaintiff's case.

The counterclaim must be struck out, but, as it was perhaps invited by the unnecessary joinder of the Woodruffs as plaintiffs, the costs of this motion will be in the cause. If defendant desires to do so, he may amend his statement of

defence, in which case this will be embodied in the order. But I do not wish to be understood as suggesting the need of any amendment.

MABEE, J.

DECEMBER 3RD, 1906.

TRIAL.

CARRICK v. McCUTCHEON.

Vendor and Purchaser—Written Offer of Option to Purchase Land—Oral Acceptance—Refusal of Vendor to Carry out—Offer not under Seal—Consideration—Finding of Jury—Taking Unfair Advantage—Mistake as to Title—Statute of Frauds—Registry Law—Commission—Breach of Contract—Damages—Loss of Profits on Re-sale.

Action to recover damages for breach by defendant of his agreement to sell land to plaintiff at the price of \$12,000.

H. Cassels, K.C., for plaintiff.

M. J. Kenny, Port Arthur, for defendant.

MABEE, J.:—On 23rd May, 1906, defendant gave to plaintiff the following option:—

“In consideration of \$1.00, the receipt of which is hereby acknowledged, I hereby give L. J. Carrick a 30 day option upon my Cumberland street property, having a frontage of 33 feet, first south of Park on Cumberland, for the sum of \$12,000, less 5 per cent. commission, payable \$2,000 cash and \$2,000 yearly till balance is paid, together with interest at 8 per cent.”

Plaintiff orally accepted this option on the morning of 24th May.

The option was not under seal, and defendant contended that the one dollar paid by plaintiff to him at the time had not in fact been paid as the consideration for the option, but was a loan by plaintiff to him. The jury found that the dollar had not been lent, but had been paid as the consideration for the option. Plaintiff stated that at the time he obtained this offer from defendant he had in fact sold the

land to one Roice for \$14,000, and afterwards, on 9th June, Roice signed an agreement to purchase at that sum. It was not contended at the trial that the land had not in fact been sold to Roice, and the bona fides of the sale, or of the written agreement, was not attacked.

Defendant stated at the trial that on the evening of 23rd May, after he had signed the option, he learned that he had only a life estate in the land; and that, subject to that estate, his daughter was the owner. He also stated that he told plaintiff on the morning of the 24th that he had made a mistake, and that plaintiff told him, at that time, that he (plaintiff) had sold the property. Defendant says he was satisfied with the price, and that he thought he had the power to sell. Plaintiff tendered a deed and mortgage, in the former joining the daughter as one of the grantors, it is stated, although the deed was not put in. The option makes no provision for a mortgage, but no objection was taken at the time of the tender, and the refusal to convey was not put upon the ground that a deed could not be called for until payment in full of the purchase money.

The defence was put upon the grounds, first, that the option, not being under seal, and no consideration passing, was not binding—the finding of the jury disposes of that ground of defence; second, that plaintiff took an unfair advantage of defendant while he was confused; third, that defendant was under the mistake that he was the owner of the property; fourth, the Registry Act and the Statute of Frauds.

I find that plaintiff did not take any advantage of defendant, and that the latter was in no way confused at the time he signed the offer. The price, defendant admits, was a good one, and he finds no fault with it.

I do not think defendant was under any mistake as to the position of the title; he had the will in his possession; he had been collecting the rents for years; and I have no hesitation in finding that he was perfectly aware of the position in which it stood, and only takes this ground now in order to avoid his contract. I do not, however, think that would be the effect, even had defendant been under the alleged mistake.

The Statute of Frauds is pleaded because, it is said, it was arranged that a mortgage should be given, and that was not embodied in the agreement or offer. I do not think that is a good ground of defence. Plaintiff is able to make out his case by producing defendant's written offer, and proving its acceptance, and I do not think that, because plaintiff stated in cross-examination that there had been some discussion about a deed and mortgage, that invalidates the agreement. . . .

[*Queen's College v. Jayne*, 10 O. L. R. 319, 5 O. W. R. 666. distinguished.]

Here the terms all appear in the writing; \$2,000 is to be paid in cash and \$2,000 yearly with interest at 8 per cent.; and because the parties may have arranged or discussed that these deferred payments should be secured by a mortgage, if defendant gave a deed, I do not think the contract would therefore become non-enforceable.

Defendant contended that plaintiff was limited in his right to damages to the expense incurred by him in searching title, etc. I find the fact to be that when the agreement was signed by Roice to purchase for \$14,000, plaintiff expected defendant to carry out his agreement. Defendant did not on the 24th, or at any time prior to the Roice sale, inform plaintiff that he could not convey—he only asked for delay until the return of his daughter, and I do not think there was anything to indicate to plaintiff before he sold to Roice that there would be any trouble about making title, and he was of opinion all along that upon the daughter's return the matter would be carried out. Defendant has never asked his daughter to join in the conveyance. He says he told her that if she did not sign the deed of her own free will he would never ask her. I have no doubt defendant could make title to plaintiff by merely asking the daughter to join in the deed. She is living with and being supported by him, and it is clear that she is carrying out the tacit wish of defendant by not joining in the deed.

The matter was not argued at the trial, but it is not entirely clear, upon a perusal of the will of defendant's deceased wife, that it is necessary for the daughter to join in the deed.

I thought during the trial that the provision in the option about the commission of 5 per cent. might affect

plaintiff's rights, but defendant stated at the trial that plaintiff was not in any way acting as his agent in the matter.

Judgment for plaintiff for \$2,600 with costs.

DECEMBER 3RD, 1906.

DIVISIONAL COURT.

BENNER v. DICKENSON.

Negligence—Injury to Animal—Fences—Failure to Shew Cause of Injury—Nonsuit—Contractor for Building of Fence along Right of Way of Power Company.

Appeal by plaintiff from judgment of County Court of Wentworth, of 13th June, 1906, dismissing the action with costs. The plaintiff, a farmer of Saltfleet township, sold a right of way across his property to the Toronto and Niagara Power Co. The defendant, as contractor for the building of the fence along the right of way, pulled down a cross-fence on plaintiff's farm, and left it in such a condition that a horse belonging to plaintiff got entangled in the wire fence and was killed. This action was brought to recover the value of the horse. Defendant set up that the injury was the result of the negligence of plaintiff in not keeping up fences and gates and in not keeping a proper watch and control over his horse.

W. M. McClemon, Hamilton, for plaintiff.

J. G. Farmer, Hamilton, for defendant.

The judgment of the Court (BOYD, C., MABEE, J., MABEE, J.), was delivered by

MABEE, J.:—The initial difficulty of plaintiff is that he failed to shew that his horse got entangled in the fence in the manner alleged. He says: "We suppose as he went down he caught his hind foot in the fence and struggled to get up;" it is not put higher than this; there are no facts given in evidence upon which the jury could pass upon this theory of the accident. The manner in which the horse got caught

in the fence is then left entirely to conjecture. The second difficulty is that there is no evidence upon which a jury could find that the fence was dangerous. It is true that some persons give their opinion that the strands of the wire are too close together, but the point for consideration is as to the legal liability of the defendant upon the undisputed fact as to the mode of construction of the fence. Under the special Act of incorporation the power company were compelled to fence in the same way that a railway company must fence. The result of plaintiff's contention would be that railway companies would be liable for negligence in erecting fences similar to the one complained of here, in the event of the happening of a like accident. The fence in itself is safe, and the mere fact of its being possible for a horse to get his foot caught fast between the strands of wire is no evidence that the fence is in itself dangerous—the same might happen in the case of the ordinary rail fence, board or picket fence.

The case as put at the trial was that the horse was rolling when his foot caught in the wire, and the whole argument of plaintiff's counsel at the trial proceeded upon that fact. There is no evidence whatever of this, nor is there any evidence of the condition of the ground, or of the horse, from which an inference might be drawn that he was rolling when the accident happened.

The County Court Judge was of the opinion that the evidence did not disclose any facts upon which a finding of negligence against defendant could be upheld, and in this, I think, he was right, and the nonsuit was proper.

The appeal should be dismissed with costs.

GARROW, J.A.

DECEMBER 3RD, 1906.

C.A.—CHAMBERS.

PRESTON v. TORONTO R. W. CO.

Appeal to Privy Council—Amount in Controversy—Original Claim for \$5,000 Damages—Abandonment of all in Excess of \$1,000—Fixing Amount in Controversy.

Application by defendants to allow security on an appeal to the Privy Council from the judgment of the Court of

Appeal (ante 504) affirming an order of a Divisional Court ordering a new trial.

Plaintiff claimed in his statement of claim \$5,000 as damages for injuries received in a collision with a street car operated by defendants' servants. At the trial before the Chancellor and a jury, the defendants' motion for a non-suit was granted, and the action dismissed with costs, but by agreement the damages were fixed at \$1,000 in case an appellate court should hold plaintiff entitled to recover. A Divisional Court reversed the judgment at the trial, and ordered a new trial, unless the defendants consented to judgment for \$1,000. Defendants did not consent, and the judgment actually issued simply directed a new trial, and that defendants should pay the costs of the previous trial and of the appeal.

Defendants then appealed to the Court of Appeal, and the appeal was dismissed with costs. They now sought to appeal to the Privy Council.

L. G. McCarthy, K.C., for defendants.

Shirley Denison, for plaintiff.

GARROW, J.A.:—Section 1 of R. S. O. 1897 ch. 48 gives a right of appeal to the Privy Council where the matter in controversy exceeds the sum or value of \$4,000.

On this application plaintiff, by his counsel, alleges, and supports his allegation by an affidavit made by plaintiff, that he is not now claiming more than the \$1,000 agreed upon at the trial, which he regarded as having been agreed upon for all purposes, in lieu of the amount originally demanded in the statement of claim, and undertakes to amend the statement of claim, if necessary, to so limit his claim.

A plaintiff in a superior court may at any stage, in my opinion, abandon a part of his claim, and upon such abandonment only the remainder can be said to be in controversy. I, therefore, think that whether the agreement as to damages at the trial had the permanent effect contended for by plaintiff or not, I must regard his abandonment before me of all claim in excess of \$1,000 for damages, and consequently must refuse this application.

The order may recite the abandonment of all damages in excess of \$1,000, which will, I suppose, be sufficient without a formal amendment of the statement of claim.

The costs should, I think, be costs in the cause.

CARTWRIGHT, MASTER.

DECEMBER 4TH, 1906.

CHAMBERS.

RE DOMINION BANK AND KENNEDY.

Interpleader—Moneys on Deposit in Bank—Death of Depositor—Will—Judgment Establishing—Rights of Executor—Adverse Claim under Agreement.

Motion by the Dominion Bank for an interpleader order.

W. B. Milliken, for the bank.

L. V. McBrady, K.C., for James Kennedy, a claimant, opposed the motion.

W. A. Baird, for Robert Kennedy, a claimant, supported the motion.

THE MASTER:—The present motion is an outcome of the litigation as to the will and estate of the late David Kennedy, father of the above claimants.

After a prolonged trial his will was declared valid, and probate has been granted to James H. Kennedy. This decision has been submitted to, and that question is *res judicata* so far as these claimants are concerned.

Together with the action referred to, there was tried another brought to set aside certain conveyances of realty belonging to David Kennedy, and made by his son J. H. Kennedy, under a power of attorney.

The trial Judge set aside those conveyances. From this decision an appeal has been taken and is now standing before the Divisional Court. I understand that it has not been heard because the evidence has not been furnished.

In that action it was set up as a defence that the impeached conveyances were made in pursuance of an agreement dated 17th October, 1905, and made, as alleged, between the father and his children, that his estate should be equally divided between them. The trial Judge has found that no such binding agreement was made. But,

until the action is finally disposed of, the question is still open. If the appeal should succeed even to the extent of a new trial being ordered, the final determination of the action may be somewhat remote.

Besides the real property, the deceased had standing to his credit in the Dominion Bank about \$20,000. On 27th January last the two claimants went to the bank with a cheque signed by both for \$20,000 so as to have this sum placed to their joint credit. This would seem to have been in pursuance of the alleged agreement, but for some reason the transfer was not made. On 14th December, 1905, J. H. Kennedy had instructed the bank that all cheques given under his power of attorney were to be countersigned by Robert, which explains the joint signature of the cheque for \$20,000.

Had that arrangement continued, the present motion might not have been necessary. But on 20th September last the present manager of the branch in which the money was deposited transferred it to the credit of J. H. Kennedy, as executor of the will of his late father, who died on 17th February last, and whose will was admitted to probate on 12th September following. On 4th October the solicitors for Robert notified the manager that no part of the \$20,000 must be paid out without their client's consent, and he himself three weeks later sent a similar notice. On 25th October the appeal in the will action was withdrawn, and next day the solicitors of the executor demanded that the bank should honour his cheques in spite of any notice or claim from Robert to the contrary.

Thereupon the bank, on 2nd November, notified Robert that they would hand the money to the executor unless he got some order to the contrary at once. At the same time the executor's solicitors were informed of this letter, as well as Robert's solicitors, and the bank's solicitors at the same time stated that they would advise the bank to honour the executor's cheques after 6th November. Against this both the claimants objected, and threatened suit. Finally, after hearing from Mr. Horsey, who was the manager at the branch in question in January last, of his recollection of what took place on that occasion, the present motion was launched, and, as no agreement could be arrived at between the claimants, it came on for argument on 30th November.

A similar motion was made in *Re Bank of Toronto and Dickinson*, ante 323, where the authorities are cited. For the reasons given there, I think the motion should be granted.

So long as the question of the validity of the agreement for equal division is in doubt, the right of the executor to the money is not fully established. The decision in *Kennedy v. Hill* only establishes the validity of the will as having been made while the testator was of testamentary capacity, and without undue influence. It would, in any case, be operative perhaps as to the legatees other than testator's children. But, however that may be, the bank would be in peril if they paid out the money to the executor under the present circumstances. No doubt, they have paid out part of the money since 20th September. The dates of such payments have not been given. But, as costs and taxes were payable out of the estate under the judgment of the trial Judge, and, as prompt payment would be for the benefit of the beneficiaries, whoever they may ultimately be found to be, I do not think this should prejudice the bank's application. Indeed, it would be in the interests of all parties that all future payments necessary for the preservation of the estate should be consented to by them *pendente lite*. If this is done, it would be more convenient that the bank should retain the money if willing to do so. If I am right in thinking that the only ground of Robert's claim is the agreement to divide equally, there will be no necessity to direct any issues at present, as that will be determined in the pending action.

An undertaking or recital to this effect should, in that case, be inserted in the order. . . .

DECEMBER 4TH, 1906.

DIVISIONAL COURT.

CLARKE v. UNION STOCK UNDERWRITING CO. OF
PETERBOROUGH.

Promissory Notes—Action on—Defences—Absence of Consideration—Plaintiff not Bona Fide Holder for Value—Collateral Contract—Oral Evidence—New Trial.

Appeal by defendants from judgment of FALCONBRIDGE, C.J., at the trial, in favour of plaintiff in an action upon two promissory notes.

H. E. Rose, for defendants.

G. H. Watson, K.C., and S. T. Medd, Peterborough, for plaintiff.

The judgment of the Court (BOYD, C., MAGEE, J., MABEE, J.), was delivered by

MABEE, J.:—Plaintiff claims recovery from defendants of \$7,000, being the amount of two promissory notes for \$3,000 and \$4,000, dated 21st August, 1905, payable to Archibald Johnson or order, 2 and 5 months respectively after date, and indorsed by him, without recourse, to plaintiff. Defendants set up several defences, the effect of which was that they had never received any value for the notes, and that plaintiff was not a bona fide holder for value. It is clear that the case has not been fully tried out, and the facts connected with the transaction are not before the Court. The case at the trial went off on the pleadings, which, in some respects, raise matters that probably would form no answer to plaintiff's claim. The Chief Justice of the King's Bench offered to hear all the evidence, notwithstanding the position the pleadings were in, but counsel for plaintiff insisted that the proposed defences were not open to defendants, and judgment went for the sum claimed. Many cases were cited upon this appeal to shew that the terms of a promissory note cannot be contradicted, and the authorities are clear that oral evidence cannot be given to shew a contemporaneous agreement that the note should not be paid, or should be renewed or the like. The defendants contended that the notes were delivered as receipts, or as evidence of certain stock in the Henderson Roller Bearing Company having been transferred to them for sale, that they had never received value for the notes, and that the plaintiff, a clerk in the office of the plaintiff's solicitors, was not a holder for value. It may be that the maker of a note cannot give evidence that the note was given as a receipt, but I think it is open to him to shew that it was given without consideration, and then if he is able to establish that the plaintiff stands in no better position than the payee, he makes out his defence.

In the latter part of paragraph 5 of the defence it is alleged that plaintiff is not the bona fide holder, and paragraph 6 alleges that no value was received by defendants for

the note; evidence has not yet been given upon either of these defences.

The matter was further confused at the trial by an agreement for sale of the stock in question by plaintiff to E. C. Howson, one of the defendant partnership, and the defendants were denied the opportunity of shewing that the stock had not been in fact transferred under that agreement, or that it had not been acted upon, or had been abandoned. This agreement was prior to the giving of the notes, was not between the parties to this action, and the date of payment mentioned in the agreement is different from the dates of maturity of the notes. I think it was open to defendants to shew all the facts connected with the transaction in question upon the record as it stood, without any amendment, the issue being simply as above indicated, nor do I think the giving of such evidence would offend against any of the authorities. All the defendants were endeavouring to do was to assert that, although they gave the notes, yet no stock was transferred to them, or other consideration given therefor, that the alleged agreement was not acted upon or was abandoned; if they could establish this, and couple with it the fact that plaintiff was really the payee of the note, and suing for him, as they allege in their defence, the result might have been different.

The defendants may not be able to establish any of these things, but they have not yet had the opportunity.

The judgment should be set aside, and a new trial had. The defendants may amend if they desire. The costs of the last trial will be reserved for disposition at the next trial, but defendants must pay plaintiff's costs of opposing this appeal.

BRITTON. J.

DECEMBER 5TH, 1906.

TRIAL.

BYERS v. KIDD.

Costs—Defamation—Verdict for Defendant—Depriving Defendant of Costs—Discretion—Rule 1130—Good Cause.

Action for defamation, tried with a jury at Peterborough.

R. F. McWilliams, Peterborough, for plaintiff.

D. O'Connell, Peterborough, for defendant.

BRITTON, J.:—Under circumstances mentioned below the jury found for defendant. Defendant asked for costs, and the question was reserved.

I am of opinion that defendant should not get costs. In exercising a discretion to deprive defendant of costs, I am acting under Rule 1130, and therefore not called upon to find what would necessarily be "good cause" within the meaning of decisions under the English Order LXV. To find "good cause" within that Order, it was held in *Jones v. Curling*, 13 Q. B. D. 262, that there must be facts shewing that it would be more just not to allow the costs to follow the event. I think there are facts here, although not such as in *Jones v. Curling*, establishing good cause.

Apart from that, it must be conceded at once that the discretion should not be arbitrarily exercised, should not be exercised "by chance medley, nor by caprice, nor in temper:" *Huxley v. West London Extension R. W. Co.*, 17 Q.B.D. 373, 376. There must be some reason reasonably satisfactory to the Judge for depriving a person who has the verdict of the jury of the benefit or indemnity that usually results from such verdict.

I find in this case what satisfies me that the discretion as to costs should be exercised against defendant. Defendant's conduct provoked litigation when the dispute would probably have ended with the termination of proceedings before a justice of the peace. Defendant after the first altercation assaulted the plaintiff. He admitted the assault, and was fined for it. Up to this point he had apparently been accusing plaintiff only upon the authority of what had been said by a person named Campbell. After defendant had heard plaintiff's denial of cutting coal bags of defendant's, and after defendant knew that Campbell had taken back what he said, and called it "a joke," defendant said to plaintiff. "Campbell told me you cut the coal bags, and if it comes to that I can prove that you cut the coal bags."

It is true that the jury found for defendant, and it may be argued that they found that defendant did not use this language. I think defendant did use this language, and it is not necessarily going behind the verdict for me, for the purpose of determining the question of costs, to so find. That language had a good deal to do with bringing this action to trial.

Again it appeared before me that there were negotiations for settlement, and defendant agreed to pay part of plaintiff's costs; plaintiff agreed to accept such settlement, and defendant refused to carry it out.

Again, the jury came in, and, instead of rendering a verdict, said "No bill—each party to pay half the costs." They were told to find for plaintiff or defendant upon the issue. After considerable time in deliberating they again came in and said, "Verdict for defendant, the costs of the Court to be equally divided by the plaintiff and the defendant."

The jury upon being sent back by the County Court Judge, who, for the purpose of taking the verdict, acted for me, returned later with the verdict for defendant.

The decision of the jury, if the discretion had been with them, instead of the Judge, would have been as now rendered by me.

For these and other reasons, I think the judgment should be for defendant without costs.

DECEMBER 5TH, 1906.

DIVISIONAL COURT.

ALLAN v. McLEAN.

Bankruptcy and Insolvency—Preference—Chattel Mortgage—Actual Advance by Third Person—Money Applied on Insolvent's Debt—Creditor's Knowledge of Insolvency—Absence of Knowledge by Third Person.

Appeal by defendants from judgment of CLUTE, J., ante 223, in favour of plaintiff, assignee for the benefit of the creditors of George R. Levagood, in an action to set aside a chattel mortgage made by Levagood to defendant McLean for \$560, as fraudulent and void as against the creditors. Levagood started a piano business in Guelph in 1904, and opened an account with the defendants the Traders Bank. His account being overdrawn, and the bank pressing for payment, defendant McLean advanced money upon a chattel mortgage made by Levagood, who handed the money over to

the bank. The trial Judge found that the loan was made at the instance of the bank manager, for the purpose of raising a sum of money to pay off Levagood's indebtedness to the bank; that McLean knew the purpose for which the loan was made; that the whole transaction was carried through at the instance and for the benefit of the bank; and that Levagood was insolvent at the time. He assigned to plaintiff 5 days later.

W. M. Douglas, K.C., for defendants the Traders Bank.

N. Jeffrey, Guelph, for defendant McLean.

J. J. Drew, Guelph, for plaintiff.

The judgment of the Court (ANGLIN, MAGEE, MABEE, JJ.), was delivered by

MABEE, J.:—The result of this case must depend entirely upon the findings of fact by the learned trial Judge. He finds that the manager of the bank believed Levagood upon the eve of insolvency; that McLean allowed himself to be used without question by the manager of the bank for the purpose of raising the money to pay off Levagood's debt to the bank; that it was not the ordinary case of a debtor applying for a loan in the usual way, obtaining that loan, and making application of it as he sees fit, but that it was a case where the intent of the parties was that a loan should be made for the special benefit of the bank, with the knowledge that if the security had been made directly to the bank it would have been void as against the other creditors of Levagood; that the advance was not made bona fide to Levagood, but was made for the bank; and that the mortgage had the necessary effect of defeating and delaying the other creditors of Levagood. The mere repetition of these findings must dispose of this appeal adversely to the defendants. The case is taken entirely outside the facts in *Gibbons v. Wilson*, 17 O. R. 290. The transaction there was sustained inasmuch as there had been a bona fide advance, the mortgagee knowing nothing about the insolvency of the mortgagor, why the money was wanted, or how it was to be applied. Here the finding is that the advance was not bona fide; that the money was to go to the bank in order that it might gain a preference over the other creditors of Levagood; and that that was the only object of the transaction. It is true that the Judge

finds that McLean was not aware of Levagood's insolvency, but the finding that he allowed himself to be used "without question" for the purpose of raising the money to work a preference to the bank, is, in effect, a finding that he intentionally refrained from making inquiry.

Unless all the findings are to be overturned, and it was not even contended that we should do that, the result is inevitable.

Appeal dismissed with costs.

DECEMBER 5TH, 1906.

DIVISIONAL COURT.

RE TAYLOR v. REID.

Division Court—Territorial Jurisdiction—Contract—Statute of Frauds—Cause of Action—Where Arising—Sale of Goods—Acceptance—Place of Delivery—Prohibition.

Appeal by plaintiff from order of TEETZEL, J., ante 623, prohibiting the 1st Division Court in the county of York from further proceeding with a plaint for the recovery of \$45, the price of a frock coat made by plaintiff in Toronto and sent to defendant in Belleville, upon the ground that the whole cause of action did not arise within the territory of the 1st Division Court in the county of York.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.

A. R. Clute, for plaintiff.

Grayson Smith, for defendant.

RIDDELL, J.:— . . . It was contended by Mr. Clute (1) that it was not necessary to prove acceptance as part of the cause of action, and (2) that, even if it were necessary to prove acceptance, letters written by defendant from Belleville and received by plaintiff at Toronto constitute an acceptance in Toronto.

As to the first point, the position taken was that the contract is the cause of action, and the only cause of action, and acceptance is merely evidence of the existence of the contract. This position must needs be taken by plaintiff if he desires to avoid the result of the decision of this Court in *Re Doolittle v. Electrical Maintenance and Construction Co.*, 3 O. L. R. 460, 1 O. W. R. 202. In that case it was pointed out that "cause of action" means "every fact that is material to be proved to entitle the plaintiff to succeed—every fact which the defendant would have a right to traverse," as distinguished from mere evidence necessary to prove such fact.

I think this contention cannot prevail. It seems now to be settled law that a contract to which the 17th section of the Statute of Frauds applies is not void *ipso facto* because the formalities of the Act may not have been complied with—the contract is still a contract, but is not enforceable against the will of the contracting party: *Bailey v. Sweeting*, 9 C. B. N. S. 843, per Williams, J., at p. 859, and Willes, J., at p. 861; *Brittain v. Rossiter*, 11 Q. B. D. 123, per Brett, L.J., at p. 127, and Thesiger, L.J., at p. 132; *Maddison v. Alderson*, 8 App. Cas. 417, per Lord Blackburn, at p. 488.

Indeed, the modern doctrine supports the contention of counsel for the defendant in *Leaf v. Turton*, 10 M. & W. 393, where it was decided that it was bad pleading and made the defendant open to a successful special demurrer to plead specially that the provisions of sec. 17 had not been complied with. At p. 395. Parke, B., says to counsel, "You say the effect of the plea is to admit a good contract at the common law, but to avoid it on the ground of the requisitions of the statute?" To which counsel answered, "Yes."

No doubt, some of the older cases made a distinction between the 4th section, which they held merely rendered the contract unenforceable, and the 17th section, which they held made the contract absolutely void.

Much of the old learning upon this has now become obsolete. The history and evolution of the doctrines may be traced by the curious in such decisions as *Laythwaite v. Bryant*, 2 Bing. N. C. 735; *Cunningham v. Roots*, 2 M. & W. 248; *Johnson v. Dodgson*, ib. 653; *Elliott v. Thomas*, 3 M. & W. 170; *Butteman v. Hayes*, 5 M. & W. 456; *Eastwood v. Kenyon*, 11 A. & E. 438, 5 M. & W. 462 (n.); *Fricker v.*

Tomlinson, 1 M. & G. 772, per Maule, J.; Reade v. Lambe, 6 Ex. 130; Leroux v. Brown, 12 C. B. 801.

But, even when such was considered to be the effect of the 17th section, it was held, under the strict system of pleading then in vogue, that where a plaintiff declared upon a contract within the statute, he must prove the acceptance or whatever act it was which took the case out of the statute, and this without a special plea setting up the statute as a defence. Such a plea, we have seen, was struck out on a special demurrer.

And under our present system of pleading in the High Court, suppose a contract set up in the statement of claim on its face within the statute, the defendant admitting the contract, but pleading simply the statute, can it be doubted that plaintiff could not succeed without proving something to take the case out of the statute? As at present advised, I think the defendant should plead thus in such a case; and if he did not admit the contract upon his pleading, he should be obliged to pay the costs of proving it, if established at the trial.

Plaintiff then must in this case prove not only the contract, but also something in the way of acceptance, that the contract may be "allowed to be good."

As to the second point, what was relied upon as constituting acceptance were certain letters written by defendant in Belleville and received by plaintiff in Toronto. These letters are, beyond question, good evidence of an acceptance sufficient to take the case out of the statute, but they are only evidence from which acceptance may be inferred, and are not the acceptance itself. Whether mere words can ever constitute an acceptance, as seems to be denied in some of the American cases, we need not decide; these letters clearly cannot be considered an acceptance; and the acceptance they tend to establish took place in Belleville.

The case is, therefore, brought within the decision in the Doolittle case.

Appeal dismissed with costs.

BRITTON, J., gave reasons in writing for agreeing with the decision of TEETZEL, J.

FALCONBRIDGE, C.J., agreed that the appeal should be dismissed with costs.

NOVEMBER 21ST, 1906.

C.A.

RE ONTARIO MEDICAL ACT.

Statutes—Ontario Medical Act—Construction—"Practising Medicine"—Use of Drugs or other Substances—Application of Statute to Christian Scientists and Others—Statute for Protection of Public—Reference of Question by Lieutenant-Governor in Council under R. S. O. 1897 ch. 84—Question of Provincial Concern—Scope of Act—Jurisdiction of Court—Application of Existing Law—Authority of Decided Cases.

Case stated by the Lieutenant-Governor of Ontario by order in council of 24th April, 1906, passed pursuant to R. S. O. 1897 ch. 84, for hearing and consideration by the Court of Appeal.

The question stated was as follows:

"Ought it to be held upon the true interpretation of sec. 49 of the Ontario Medical Act, R. S. O. 1897 ch. 176, that a person not registered under that Act, undertaking or attempting for reward to cure or alleviate disease does not practise medicine within the meaning of that section merely because the remedy advised, prescribed, or administered by him does not involve the use or application of any drug or other substance which has or is supposed to have the property of curing or alleviating disease, that is to say, do the words "to practise medicine" in the said section mean to attempt to cure or alleviate disease by the use of drugs, etc., or do they include cases in which the remedy or treatment advised, prescribed, or administered, does not involve the use of drugs or other substances which have or are supposed to have the property of curing or alleviating disease?"

The case was heard on the 18th and 19th September, 1906, by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, J.J.A.

W. Nesbitt, K.C., and H. S. Osler, for the College of Physicians and Surgeons of Ontario.

S. H. Blake, K.C., and J. E. Day, for the Osteopaths.

H. Cassels, K.C., and R. S. Cassels, for the First Church of Christ Scientists.

W. M. Hall, for other Christian Scientists.

THE COURT answered the question as follows:—

“That each case must depend or be determined on its own circumstances; but dependent upon the facts in each case there may be a practising of medicine which does not involve the use of drugs or other substances having or supposed to have the property of curing or alleviating disease.”

The following opinions were certified to the Lieutenant-Governor.

Moss, C.J.O.:— . . . Before dealing with the question, it is necessary to consider shortly an objection raised to the power of the Lieutenant-Governor in council to refer it. It is said that it not within the scope of the authority to refer conferred by the Act, and that it is not within the competency of this Court under the Act to make answer to it.

The power of the legislature to confer the most ample authority to refer to the Court questions of the widest and most extensive character can scarcely be doubted. And that the exercise of such power has not been deemed incompatible with the working of responsible government is shewn by the fact that in 1833 the Imperial Parliament, by the 3 & 4 Wm. IV. ch. 41, sec. 4, empowered the Sovereign to refer to the Judicial Committee of the Privy Council “for hearing or consideration any such other matter as His Majesty shall think fit,” a power which exists and has been acted upon up to the present day; and that when the Supreme Court of Canada was established in 1875, a power similar to that in respect of the Privy Council was conferred on the Governor in council with respect to the Supreme Court: see R. S. C. ch. 135, sec. 37, as amended by 54 & 55 Vict. ch. 25, sec. 4.

And legislation similar to R. S. O. 1897 ch. 84 has been enacted by the legislatures of some of the other provinces of Canada.

The only question can be, has the legislature, by the Act in question, enabled the Lieutenant-Governor in council to submit the questions now before us?

The words of sec. 1 are very plain and free from ambiguity. They are: "The Lieutenant-Governor in council may refer to the Court of Appeal . . . any matter which he thinks fit to refer, and the Court shall thereupon hear or consider the same." There is no context to qualify or restrain the usual and ordinary signification of this language. There is nothing to control the ordinary grammatical meaning of the words used. It is true that the title of the Act is "An Act for expediting the decision of Constitutional and other Provincial Questions." The once apparently well settled rule that the title is not a part of the statute, and ought not to be taken into consideration in construing it, seems not to be always strictly adhered to in recent times. The relaxation may be due to the modern practice of inserting in the statute a section enacting that it may be cited by some short title, in which case the section may be looked at as a good general description of all that was done by the Act: Wilberforce on Statutes, 2nd ed., p. 205.

Here, however, there is no such section, and the words "other provincial questions" seem wide enough to include almost any manner of question. The legislature was content to trust to the Lieutenant-Governor in council to exercise a proper and judicious discretion in availing himself of the authority given him. The limitations must come in that way or from legislative amendment of the statute. In a case before the Judicial Committee a question as to the jurisdiction of the Committee under sec. 4 of 3 & 4 Wm. IV. ch. 41 was raised, and their Lordships held that the only construction which could be placed on the words of the section was a construction which should give full and complete meaning to them without limitation. Speaking for the Committee, Dr. Lushington said further: "Now these words have already been the subject of some discussion before the Judicial Committee, and I believe one or two attempts were made in the first instance to impose a limitation upon them; but the Judicial Committee were of opinion, though it did not come before the public, that they were not entitled to put any limitation upon these words in any of the matters referred to them by the Crown. The same opinion is entertained by their Lordships upon the present occasion. . . . Their Lordships are of opinion that there is enough in this reference not merely to justify but absolutely to require them to proceed, because this is referred to them by an order in council.

and the order in council which refers it to them falls within the purview of the provisions of the statute 3 & 4 Wm. IV. ch. 41, sec. 4, which enacts and prescribes what shall be their duty, and in compliance with that duty they must entertain the prayer of this petition and hear it:" In re Schlumberger, 9 Moo. P. C. 1, at p. 12.

It is to be presumed that the executive, in the exercise of the authority vested in it by the legislature, will be careful to see that only such questions are referred as reasonably fall within the purview of the statute, and as are reasonably proper to be heard or considered by a court of law.

I am not one of those who are of the opinion that the Ontario Medical Act is an Act not passed in the public interest. That it is a public Act in the fullest sense and not merely a private Act is shewn by its inclusion in the Revised Statutes. Its early origin was due to an intelligent, wise, and far-sighted apprehension by the legislature of the policy of protecting the public from the dangers and inconveniences arising from unskilful and unqualified persons assuming to practise as physicians and surgeons. The legislature of that early day shewed its appreciation of the need of thorough education in medicine, as in every other department of knowledge. Experience has proved that the means then adopted of requiring all persons desirous of so practising to submit to examination and obtain a license, were undoubtedly productive of benefit and advantage to the province. They have since developed into the system of study, preparation, and examination now provided for by R. S. O. 1897 ch. 176, and it cannot be doubted but that the public at large share very largely in the advantages derived from the presence in their midst of a body of learned and skilled practitioners. It is not merely by what has been and can be done in the cases of individual patients, but (as has been well said by a great modern physician) as much by what is accomplished in the way of protection of the public generally against disease and contagion, that medicine proves itself a great science as well as a delicate craft.

And it cannot but be in the public interest to secure to the community the services of persons accredited as they must be under the Ontario Medical Act.

I think, also, that in placing a construction on the Act or the section in question, we are not to have regard only to

the terms of the earlier Acts to the exclusion of the later, and to say that only what may have been understood as included in the term "prescribe for the sick" or "practise physic" or "practise medicine," at the time when they were first used in the legislation, shall be included, and that all else shall be excluded

By the terms of the Interpretation Act, sec. 8 (1), the law is to be considered as always speaking, and whenever any matter or thing is expressed in the present tense, the same is to be applied to the circumstances as they arise, so that effect may be given to each Act, and to every part thereof, according to its spirit, true intent, and meaning.

And in placing a construction upon the part of the Act in question, we are not to close our eyes to the great changes which have taken place in recent years in therapeutic methods. It is common knowledge that there has been a marked change, almost a revolution, in the position assigned to drugs as therapeutic agents. While they are not discarded, their use or application is by no means so extensive as formerly, and the well equipped practitioner of to-day seeks to study thoroughly and apply scientifically a few real medicines or healing agents, and does not feel under obligation to give any medicine in cases where in earlier times he would have considered any treatment that dispensed with it unscientific and improper.

Section 49 ought not to be read otherwise than in the light of considerations such as here suggested.

But when we come to consider the question referred many difficulties present themselves.

Much difficulty in dealing with it in a satisfactory manner is created by its nature and frame. No facts are stated. There is nothing but the bald question. It is to be borne in mind that, in dealing with questions under the statute, the Court is not exercising its ordinary appellate jurisdiction.

Dealing with the powers of the Supreme Court under sec. 37 of the Supreme Court Act referred to above, Taschereau, J., said: "Our answers are merely advisory, and we have to say what is the law as heretofore judicially expounded, not merely what is the law according to our opinion. We determine nothing. We are mere advisers, and the answers we give bind no one, not even ourselves." *In re Provincial Fisheries*. 26 S. C. R. at p. 639.

The words "although advisory only," which occur in subsec. 6 of sec. 37, as amended, are not in our statute, but their insertion was scarcely necessary. All the other provisions of the statute go to shew that the opinion given is only for the information of the Lieutenant-Governor in council. It is to be certified to him, and no judgment or report in open Court is delivered. The same practice is observed in the Judicial Committee: *Safford & Wheeler's Privy Council Practice*, p. 33, note (n.) It is not a judgment appealable to the Supreme Court of Canada in *Union Colliery Co. v. Attorney-General for British Columbia*, 27 S. C. R. 637, a case under a similar Act of the legislature of British Columbia.

As I read the Act, the Court is to be guided in giving its opinion by the settled decisions, and, unless in the case of conflicting decisions, it is not to pronounce whether they ought or ought not to have been decided as they were.

Therefore, in considering the question, regard must be had to the decided cases bearing upon it. Having regard to the way in which the second part of the question interprets the first part, we are asked to put a legal interpretation on the words "to practise medicine" in sec. 49 of the Ontario Medical Act, which interpretation is to be applied to every possible kind of case that may arise. We are asked to say whether their meaning is to be confined to treatment of illness or disease, or whether their meaning extends to include treatment which does not involve the use of drugs or similar therapeutic agents. The generality of the question prevents a categorical answer. It would not be possible, even by attempting a process of exclusion, to cover all cases that might arise. It is possible to say—because it has been so decided by a Court of competent jurisdiction—that the defendant in the case of *Regina v. Stewart*, 17 O. R. 4, in doing what he did in that instance was not practising medicine. But, unless there is a concrete case with the facts proved or known, how is it possible to say whether or not the words of sec. 49 are applicable? If the answer given was that if it were shewn that a person not registered under the Ontario Medical Act attempted to cure or alleviate disease by methods and courses of treatment known to medical science and adopted and used in their practice by medical practitioners registered under the Act, or advised or prescribed treatment for disease or illness such as would be advised or prescribed by the registered practi-

tioner, then, although what was done, prescribed, or administered did not involve the use or application of any drug or other substance having or supposed to have the property of curing or alleviating disease, he might be held to be practising medicine within the meaning of sec. 49, it would still leave the matter to be dealt with in a concrete case, in which the ultimate decision must turn upon the facts found.

And yet, as the case presents itself to me, this is the only way in which the question is capable of being answered without, as I have said before, endeavouring by some process of exclusion to imagine and provide for all possible cases.

In the case of the Lord's Day Act of Ontario, I ventured to remark, with reference to some of the questions there propounded, that to undertake to answer them would be to endeavour to give an exhaustive definition of "works of necessity," or to lay down a series of abstract propositions not having application to any particular case or set of circumstances, a thing dangerous to attempt, and if attempted likely to lead to embarrassing and probably mischievous results when afterwards sought to be applied to actual cases: 1 O. W. R. at p. 316.

When the same case was before the Judicial Committee of the Privy Council, Lord Chancellor Halsbury, referring to the questions other than the first, said: "They are questions proper to be considered in concrete cases only; and opinions expressed upon the operation of the sections referred to and the extent to which they are applicable would be worthless for many reasons. They would be worthless as being speculative opinions on hypothetical questions. It would be contrary to principle, inconvenient, and inexpedient, that opinions should be given upon such questions. Where they arise they must arise in concrete cases involving private rights; and it would be extremely unwise for any judicial tribunal to attempt beforehand to exhaust all possible cases and facts which might occur to qualify, cut down, and override the operation of the particular words, when the concrete case is not before it:" [1903] A. C. at p. 529.

The question referred in the present instance is attended by the same difficulties, dangers, and mischiefs. It does not permit of an unqualified affirmative or negative answer, and no other answer can be framed to meet all the possible cases and facts that might occur.

OSLER, J.A.:—The difficulty in the way of answering satisfactorily questions submitted under the Act for “expediting the decision of constitutional and other provincial questions” has frequently been commented on by the Courts which have been invited—or ordered—to solve them. Generally, they are abstract questions, the answers to which must almost necessarily be of an academic or advisory character, and practically not binding upon the Court in a real litigation. I may refer to what I have said on this subject in *Re Lord’s Day Act of Ontario*, 1 O. W. R. 312, and other like cases, and to the observations of Lord Halsbury in delivering the opinion of the Judicial Committee in the same case. [1903] A. C. 524; and to the certificate of the Judges respecting a Court Martial (1760), 2 Eden 371 (Appx.)

The question now proposed does not admit of an answer covering definitely and categorically all cases which may arise under sec. 49 of the Ontario Medical Act, R. S. O. 1897 ch. 176. To practise medicine has long since ceased to convey the idea that it is confined to the administration of drugs, nor do I agree that this expression in the Medical Act is limited to so bald a meaning. To hold that it is, would be to refuse to recognize that the thoughts of men in the most liberal of all the learned professions have widened in the past half century, and to affirm that legislation has gone backward, instead of keeping pace with the knowledge of the times.

Nevertheless, we cannot say that the profession, wide as have been its conquests and extended the scope of its practice, has taken all knowledge of the art of healing for its province, and therefore the question submitted (in its alternative form) does not admit of a universal answer in the affirmative. We can only say that the words to practise medicine *may* include cases in which the remedy prescribed, etc., does not involve the use of drugs or other substances. Every case must stand and be determined upon its own facts and circumstances. We cannot lay down a rule or formulate an answer which will include all. I ought to add that I regard the Medical Act as one passed, as its predecessors have been from a very early period, mainly in the interest of the public, and not for the purpose of creating a close professional corporation. The observations addressed to us during the argument founded on the latter assumption, as if the present proceeding had been promoted, as certain

rules of equity are said to have arisen, less from a spirit of piety—sc., public policy—than the love of fees, seem hardly warranted.

GARROW, J.A.:—. . . R. S. O. 1897 ch. 84 is intituled “An Act for Expediting the Decision of Constitutional and other Provincial Questions;” and, although sec. 1 provides that the Lieutenant-Governor in council may refer “any matter” which he thinks fit to refer, the “any matter” ought, I think, to be construed as meaning any matter of a constitutional or provincial nature.

The question submitted is certainly not constitutional, and I doubt if it can properly be called provincial, in the sense in which, in my opinion, that somewhat vague term is used in the statute. Otherwise there is nothing to prevent a similar submission in any case, however trivial, involving the construction of a provincial statute. This would, of course, be objectionable, and would speedily bring the statute into disrepute. However, as my doubt is addressed more to the policy of submitting them than to the strict power to submit, I shall proceed to answer the question as best I can.

Before doing so, however, there are one or two preliminary matters. . . .

First, what is the general meaning and purpose of the statute R. S. O. 1897 ch. 176? Was its prime object . . . the protection of the public against quackery in medicine, or was it the, perhaps, no less laudable and entirely proper one of organizing and protecting the profession? . . .

The Act is intituled “An Act respecting the Profession of Medicine and Surgery.” Its history in one form or other goes back for many years, and sec. 49, the section in question, has had substantially its present form since at least 1874, 37 Vict. ch. 30, sec. 40 (O.), except that the prohibition there is against practising “physic,” etc.—an unimportant difference, in my opinion. And the plain object of the statute, in its various evolutions and developments, was, I think, to organize the profession of medicine, and to create an examining and licensing body, and to prohibit the unlicensed from practising in competition with the licensed, and whatever protection the public receives comes incidentally from presumably having under the statute a learned

body of practitioners, who have passed the necessary examinations before being admitted to practise, upon whom to call when required. . . . The prime object of the section in question is the protection of the monopoly of practising, and not the protection of the public against the quacks or unregistered. . . .

In my opinion, we are bound in answering the question to regard the decisions already given upon the construction of the section in question. The decisions so given, so far as they go, for they have probably not covered the whole ground, establish the law upon the subject, and cannot be reviewed by us as if this was an appeal from them or any of them. If the law as so declared is wrong, or if from any cause they are unsatisfactory, the proper forum for their reconsideration is, of course, the legislature, where all parties are presumably represented, and can be properly heard, and full justice done. . . .

"Practising medicine" is not a definite and finally established term. There is much room for argument both as to what should be called "medicine," and as to what should be called "practising." . . . The question asked, which must always depend for its proper and complete answer upon the facts as well as the law, is, in my opinion, incapable of a satisfactory or categorical answer, yes or no, upon the material before us.

The nearest I can come to it is this. The term "practising medicine" need not and does not, in my opinion, necessarily involve only the prescribing or administering of a drug or other medicinal substance, but may well include all such means and methods of treatment or prevention of disease as are from time to time generally taught in the medical colleges and practised by the regular or registered practitioner. . . .

When these words were first used in the statute, it is probable that the main reliance of the profession was upon treatment by means of drugs. But it is, I think, common knowledge that drug treatment has at least diminished in modern practice, and that greater attention is being paid to other methods, either in addition to drug treatment or in substitution for it, such as food, drink, regulated exercise, fresh air, bathing and other uses of water, electricity in its

various forms, massage, etc.; and, in my opinion, the words "practising medicine" may in certain circumstances include these and similar methods of treatment of disease, actual or threatened, as well as the mere administration of drugs.

The difficulty, however, is in the practical application of the prohibition to the other methods. The thing practised must, to be illegal, be an invasion of similar things taught and practised by the regular practitioner; otherwise it does not affect his monopoly, and is outside the statute. And it must be practised as the regular practitioner would do it, that is, for gain, and after diagnosis and advice. And it must be more than a mere isolated instance, which is insufficient to prove a "practice:" see *Apothecaries Co. v. Jones*, [1893] 1 Q. B. 89.

A patient may always do his own diagnosing and buy and use what he chooses (except certain poisons) upon himself. See *Regina v. Howarth*, 24 O. R. 561. . . . *Regina v. Coulson*, 27 O. R. 59. . . .

And if the patient may legally go to the druggist in such circumstances, he ought reasonably to be held to be at liberty to go to the Christian Scientist, the Osteopath, the Medical Electrician, the Masseuse, etc., and request, obtain, and pay for the treatment which these persons give, so long as he does his own diagnosing and prescribing. This is simply to say, in another form, that the patient may, as he always, so far as I know, might, be his own doctor, just as he may, however unwisely in both cases, be his own lawyer. See as illustrative cases: *Regina v. Stewart*, 17 O. R. 4; *Regina v. Valleau*, 3 Can. Crim. Cas. 435. . . .

MACLAREN, J.A.:—We were asked on behalf of the College to review the cases in our Courts bearing upon the question asked, from *Regina v. Hall*, 8 O. R. 407, to *Regina v. Coulson*, 27 O. R. 59, and to say whether they were correct; and we were urged particularly to say that *Regina v. Stewart*, 17 O. R. 4, was not good law. I do not think that we can properly undertake such a task. . . .

As the question has been submitted to us by the proper authority, and may be said to be a provincial question, as it asks for an interpretation of a provincial statute directly affecting a large class of citizens, and indirectly affecting the whole community, I consider it to be our duty to answer it as best we can.

The part of sec. 49 of R. S. O. 1897 ch. 176 which we are asked to interpret has been on our statute book, substantially in its present form, for nearly a century. In the first Act, 50 Geo. III. ch. 10, the term used was to "practise physic." This phrase was used up to the Act of 1869, 32 Vict. 45, when the words used were "practise medicine." In the Act of 1874, 37 Vict. ch. 30, the old words were restored, but in the revision of 1877, ch. 142, the words "practise medicine" were substituted, and these have been retained in the revisions of 1887 and 1897. I think the words have been used interchangeably and as synonymous, although "physic" may be more suggestive of the use of drugs. . . .

I think we should endeavour to ascertain what was the fair meaning of the words "to practise medicine" when they were last enacted by the legislature. In my opinion, they were used in their usual or popular signification. . . .

[Reference to Murray's New Oxford Dictionary, "Medicine."]

Diagnosis and the giving of advice are usually important elements. This appears in the oldest case to which we have been referred, No. 62 in 6 Mod. (1703.) Rose, the apothecary who was convicted in the Queen's Bench of practising physic, obtained a reversal of the judgment in the House of Lords, as would appear from the report, largely on the argument that he had not given advice: 5 Bro. P. C. 553. This view is, in my opinion, strengthened by some words which follow those we are asked to interpret in sec. 49 of R. S. O. 1897 ch. 176. I refer to the fact that it is made an offence for an unregistered person to "advertise to give advice in medicine." . . .

Not only have the changes which have taken place in the practice of medicine a bearing upon the subject, but also the minute specialization which has gone on increasingly of late years. Many things might be a practising of medicine to-day that could not have been properly so described years ago. This is an additional reason why it is difficult for the Court to give a comprehensive definition, so some of these matters could only be determined by satisfactory evidence.

If, however, the question submitted to us is to be categorically answered, and the word "substances" is to be interpreted as something of the same nature as drugs on the

rule of ejusdem generis, I could have no hesitation in giving a negative answer to the first part of the question and an affirmative answer to the last part of the question as to the possibility of the words "to practise medicine" including cases where drugs, etc., may not be prescribed or administered.

MEREDITH, J.A.:— . . . Our first duty is to ascertain what, if any, jurisdiction the Court has in the matter. . . . The question referred is really whether *Regina v. Stewart*, 17 O. R. 4, was rightly decided; and that question is raised solely at the instance and in the interests of the medical profession of Ontario, under the name and style of "The College of Physicians and Surgeons of Ontario." The province is not directly interested in, and did not present, the case; nor indeed was it at all represented on the argument of it. . . .

The words of the Act are very broad—"May refer . . . any matter which he thinks fit to refer;" but obviously all that the broadest meaning of the words might cover cannot be meant. . . . The Act must, in my opinion, be restricted to (1) legal questions, (2) respecting matters within the jurisdiction of the Court, and (3) of provincial concern. . . .

My conclusion . . . is: (1) that there was no power to refer the matter in question because it was one without the jurisdiction of this Court, or else that the order referring it was improvidently made, under the mistake that the question could not be brought up to this Court through the ordinary channels; and (2) that there was no power to refer it because it is not a provincial question, but one raised and referred wholly at the instance and for the benefit of the Ontario College of Physicians and Surgeons.

But, as a majority of this Court is of a different opinion, it becomes necessary to answer the question; and, in my opinion, it should be answered in accordance with the judgment of the Divisional Court in the case of *Regina v. Stewart*, 17 O. R. 4, first because it was so decided nearly 18 years ago, and that decision has ever since been deemed to have, and has been treated as having, settled the law upon the subject, and hundreds, if not thousands, of reputable persons have established themselves in business on

the faith of it and under its protection, and the legislature not slow to speak when its words have been misinterpreted has given to it the assent of 18 years' silence—if there can be legislative assent by silence; and second, because the case was rightly decided. In my opinion, the word "medicine" thrice used in the section in question—sec. 49 of the Ontario Medical Act—should be given its primary and popular meaning, and not the very far-reaching interpretation the College contends for. If it mean the art or science of preserving and restoring health, in the sense of wholeness or soundness, of body and mind, it would include the art of surgery, for a broken limb is unsoundness, just as much as disease, and would make the use of that word unnecessary and improper. So too, though not altogether so plainly, the use of the word midwifery, which really is the art of preserving the health of the mother and child in child-birth. Some meaning ought to be given to each word. They should not be treated as a case of tautology; and the best method of so doing is to give to each its popular — its generally understood—meaning. So treating them, each of the three words has its distinct place; medicine, any substance used for the prevention, healing, or alleviation of disease; surgery, the art of healing or alleviating disease or injuries of the body by manual operation; and midwifery, the art of assisting women in child-birth. To most minds, the word "practise medicine" would mean practise the art of healing the sick by means of medicines or drugs; and "practise surgery" would mean the healing of injuries and diseases by surgical operations; and such was, speaking generally, in my opinion, the meaning of the legislature. If not, if the very widest meaning is to be given to each word the dentist, the chiropodist, the manicure, and even the barber, frequently brings himself within the penalty of the section. The section was not intended to have such a far-reaching effect. Every member of the medical profession is or is supposed, and ought, to be skilled in the use of drugs or medicaments—generally called medicines—and use them in his practice; to the ordinary patient it is generally, if not always, a treatment of drugs; that, in some cases, patients may not be given drugs—may be required to abstain from all sorts of drugs—does not alter the general rule, nor do away with the fact that the practice of medicine by members of the medical profession is largely a practice in drugs.

It therefore seems difficult to say that one who has nothing to do with drugs, or one who reprobates their use in sickness and in health, one who would not throw physic even to dogs, practises medicines. Or that the laying on of hands, whether in a devout manner, or after the more robust fashion of the "osteopathist" or of the "masseur," is practising medicine. That is really more like practising surgery. But no question as to that is asked. Or that the healing of the sick by faith alone is an infraction of the Act.

If the larger meaning is to be given to the word "medicine," that must now be done by legislation, not by adjudication, or by way of opinion under the Act for expediting the decision of constitutional and other provincial questions. And if the public, and not merely the medical profession, need protection against "Christian Science," "Osteopathy," "massage, or any other "cure," it might be better not to limit the penalties to those who so practise for hire, gain, or hope of reward, but extend it to all who do the wrong, for wrong it then will be just as much without as with a fee.

MEREDITH, C.J.

DECEMBER 7TH, 1906.

CHAMBERS.

CAMPBELL v. CLUFF.

Parties—Joinder of Defendants—Cause of Action—Pleading—Negligence.

Appeal by defendants the Corporation of the City of Ottawa from order of local Master at Ottawa, ante 740, dismissing a motion by the appellants for an order requiring plaintiff to elect against which of the defendants he would proceed.

H. E. Rose, for appellants.

H. S. White, for defendants the Cluffs.

H. M. Mowat, K.C., for plaintiff.

MEREDITH, C.J., dismissed the appeal; costs in the cause.

Baines v. City of Woodstock, 6 O. W. R. 601, 10 O. L. R. 694, commented on.

MACMAHON, J.

DECEMBER 7TH, 1906.

TRIAL.

CARTON v. WILSON.

Vendor and Purchaser—Contract for Sale of Land—Specific Performance—Offer to Sell Land—Absence of Consideration—Right to Withdraw before Acceptance—Company—Service of Notice of Withdrawal on Secretary—Notice Addressed to Secretary Personally.

Action for specific performance of an alleged contract for the sale and purchase of land.

A. P. Poussette, K.C., and G. Edmison, K.C., for plaintiff.

D. O'Connell, Peterborough, for defendant.

MACMAHON, J.:—The Trent Valley Sugar Provision and Cold Storage Company, Limited, was incorporated under the Ontario Joint Stock Companies Letters Patent Act. At a meeting of the provisional board of directors of the company, held on 23rd September, 1905, Mr. J. E. Dixon was by resolution appointed president, Mr. A. P. Poussette, secretary, and Messrs. Edminson & Dixon, solicitors of the company. After appointing the officers of the company, and on the same day, the directors passed by-law No. 1, entitled "A By-law to regulate the Affairs of the Company," to which is attached the seal of the company, attested by J. E. Dixon, the president, and A. P. Poussette, the secretary.

Section 1 of the by-law provides that the affairs of the company shall be managed by 5 directors, of whom not less than 3 shall constitute a quorum.

By sec. 15, the officers of the company to be appointed by the board of directors shall consist of a secretary, manager, and such other officers as the board may deem advisable.

On 24th March, 1906, Mr. Poussette, the secretary, and George Carton (the husband of the plaintiff), who acted as

underwriter for the company, went together to defendant and obtained from him the following offer:—

“To the Trent Valley Sugar Provision and Cold Storage Company, Limited: I hereby offer you my property, park lots Nos. 12 and 13 in No. 14 in the 11th concession of North Monaghan, at the price of \$6,000, and in the alternative said park lot No. 12 at the price of \$3,000. This offer is to be open and irrevocable for 6 months from the date hereof, and subject to the condition that I am to have the right to take off this year's crop. If the boundary between lots 12 and 13 turns out to be north of my house, I am to have the land covered by my house. Dated March 24th, 1906. Hermon Wilson.”

The offer not having been accepted, defendant on 12th September handed to Mr. A. P. Poussette the following letter:—

“A. P. Poussette, Esq., K.C., Peterborough. Dear Sir:— Please take notice that the option which I gave you and Mr. George Carton last spring covering land in Monaghan is withdrawn. Hermon Wilson.”

When defendant handed the letter to Mr. Poussette, the latter told defendant he did not think he could withdraw the option. The defendant replied that that was what it meant. Mr. Poussette then said that Mr. Carton would be back on Saturday the 15th, and he would see Carton about it, and there would be a meeting of the directors on the 15th, and the option would probably be dealt with at that meeting. Defendant told Poussette that while the option as to both lots was withdrawn, he would be willing to sell the company one of them.

At the directors' meeting on the 15th no action was taken, but at a meeting of the directors on 17th September a motion was carried that defendant's offer of both lots for \$6,000 be accepted, and that he be notified thereof.

This further resolution was then passed by the board:—

“That in the event of the company being unable to provide the necessary funds to take up the option, the president and secretary are hereby authorized to assign the company's right to any person or persons who, in their judgment, should have the advantage of the option.”

On 19th September defendant was sent a notification under the seal of the company, attested by the president

and Mr. Poussette, as secretary, that his offer to sell the lots at the price mentioned had been accepted.

The directors then passed a resolution by which the company agreed to assign to Charlotte Carton, wife of George Carton, and on the same day (19th September) the company, in consideration of \$1, assigned to her all their rights and interests under the offer and acceptance, and all their right, title, and interest in the lands.

By the action specific performance is sought of what is alleged by the plaintiff to be a binding agreement to sell.

Two questions arise for determination in this case. First, did the offer of defendant, by reason of its containing the words "to be open and irrevocable for 6 months," prevent its withdrawal or revocation by defendant prior to acceptance within the time limited. Second, was the service of notice of retraction on Mr. Poussette, the secretary of the company, sufficient notice?

As to the first question, it was admitted, that there was no consideration moving from the company to defendant for the offer made by him. And Mr. Pollock in his work on Contracts, 6th ed., p. 24, says: "An offer may be revoked at any time before acceptance but not afterwards. For before acceptance there is no agreement, and therefore the proposer cannot be bound to anything. So that, even if he purports to give a definite time for acceptance, he is free to withdraw his proposal before that time has elapsed. He is not bound to keep it open unless there is a distinct contract to that effect founded on a distinct consideration."

The words "to be open and irrevocable for 6 months" cannot, in my opinion, alter the rights or power of the person making the proposal, for it is not the less a nudum pactum, although having these words in it, and is not binding on the promisor. . . .

[Reference to *Dickinson v. Dodds*, 2 Ch. D. 463; *Warner v. Millington*, 3 Drew. 523; *Larkin v. Gardiner*, 27 O. R. 123, and the cases there cited.]

As to the second question. Consolidated Rule 159 reads: "Where a corporation is a party to a cause or matter, a writ or summons or other document may be served on the . . . president or other head officer . . . or on the cashier, treasurer or secretary, clerk or agent, of such corporation." . . .

[Reference to *Newby v. Von Open*, L. R. 2 Q. B. at p. 296.]

As the Rule makes the services of process on the president or secretary good service on a corporation, service of notice of revocation on the secretary of the plaintiff company must be good service.

It was argued that, as the letter of revocation was addressed "A. P. Poussette, K.C.," and not to him as secretary of the company, notice of the revocation could not be imputed to the company. That argument appears to me to be far-fetched. The letter of revocation refers to the option given to "you" (Mr. Poussette) "and George Carton," which option was written by Mr. Poussette, who was secretary of the company, and was addressed to the company, and Mr. Poussette knew the letter of revocation was intended for the company, for when it was delivered to him he said that the question of the option would be brought up at the directors' meeting on 15th September, and he cannot now be allowed to say that he did not receive the letter of revocation on behalf of the company, or that its receipt by him was not notice to the company.

As the option was revoked before the company passed the resolution to accept, the company had no right or power to assign the option to plaintiff (Mrs. Carton), and the action must therefore be dismissed with costs.

MULOCK, C.J.

DECEMBER 7TH, 1906.

TRIAL.

GYORGY v. DAWSON.

(TWO ACTIONS.)

Master and Servant—Injury to Servant and Consequent Death—Action under Fatal Accidents Act—Action Maintainable although Deceased an Alien and Action Brought for Benefit of Aliens Resident abroad.

Actions to recover damages for the deaths of Andrew Muszkuiki and Joseph Gabor, by the alleged negligence of de-

dents Act, by one Gyorgy, who had taken out letters of administration to the estate of the two deceased men, for the benefit of their families.

The two actions were tried together with a jury at Welland, and resulted, the first, in a verdict for plaintiff for \$200, and the second, in a verdict for plaintiff for \$100. Thereupon defendants moved to dismiss the actions, because the deceased were aliens, and the beneficiaries aliens resident abroad.

F. W. Griffiths, Niagara Falls, and McGuire, Niagara Falls, for plaintiff.

F. W. Hill, Niagara Falls, and T. F. Battle, Niagara Falls, for defendants.

MULOCK, C.J.:—Andrew Muszkulki and Joseph Gabor were, at the time of the accident hereinafter mentioned, citizens of Hungary, but resident in the county of Welland, and were employed by defendants to work in a wheel-pit on the Ontario side of the Niagara river. When being lowered by a bucket into the pit, a chain which supported one side of it became unhooked, whereby they were thrown from the bucket and instantly killed. At the time of the accident Muszkulki was a married man with one child, his wife and child being aliens resident in Hungary, and Gabor was an unmarried man, who left a mother, also an alien, resident in Hungary.

These actions are brought by the administrator of the two deceased men for the benefit, in the one case of the widow and child, and in the other for the benefit of the mother.

The provincial laws being, as they are, applicable to foreigners within the province, the deceased if only injured would have been entitled to sue defendants in respect of the injury, but they were killed, and it is contended that any cause of action arising under the circumstances in question died with them. The amendment to Lord Campbell's Act, being sec. 2 of R. S. O. 1897 ch. 135, enacts as follows:—"Where the death of a person has been caused by such wrongful act, neglect, or default as would (if death did not ensue) have entitled the party injured to maintain an action and recover damages in respect thereof, in such a case the person who would have been liable, if death did not ensue shall be liable

to an action for damages notwithstanding the death of the person injured," etc.

Defendants in this case, borrowing the argument advanced in *Adam v. British and Foreign Steamship Co.*, [1898] 2 Q. B. 430, contend that it is not the policy of Parliament to legislate for persons over whom it has no control, either in the way of imposing burdens on them or of conferring benefits, and that, in the absence of an expression of such intention, the amendment to the Act does not give a cause of action under the circumstances present in these cases.

The same question came up in *Davidson v. Hill*, [1901] 2 K. B. 606, which expressly overruled *Adam v. British and Foreign Steamship Co.*, *supra*. *Davidson v. Hill* dealt with a cause of action arising under the laws of the United Kingdom, and the reasoning in that case would apply with still greater force to a cause of action arising under the laws of a province of the Dominion of Canada.

If persons beyond the legislative control of the province of Ontario are not entitled to the benefit of the amendment to Lord Campbell's Act, then British subjects resident in other provinces, equally with aliens resident in a foreign country, would be beyond its scope. The amending Act draws no distinction between relatives who may be aliens resident abroad and relatives being British subjects resident in another province, but, in general words, in effect declares that if the death of a person happens under circumstances which if he had been only injured would have entitled him to maintain an action for damages, the person causing such death shall be liable in damages to the relatives of the deceased.

Could it be seriously contended that the legislature intended that the amendment should not apply for the benefit of relatives of the deceased being British subjects resident in another province? And yet that would be the necessary construction to place upon the Act if defendants' contention were to prevail.

Following *Davidson v. Hill*, I consider plaintiffs entitled to maintain these actions.

During the argument I expressed my surprise at the smallness of the verdicts, which I thought wholly inadequate, and counsel for plaintiff thereupon requested me to state my views upon the point when dealing with the motion. Inasmuch as any exception to be taken to the verdicts is a mat-

ter entirely for a Divisional Court, I do not wish to add anything to what I have above stated.

Let judgment be entered for plaintiff for the amount of the verdicts in question, with costs of action in each case on the High Court scale.*

DECEMBER 7TH, 1906.

GREEN v. GEORGE.

Judgment—Issue as to Validity of Default Judgment—Motion to Set aside Judgment after 15 Years—Service of Writ of Summons—"Signing Judgment"—Sufficiency—Form of Judgment—Special Indorsement of Writ—Price of Goods Sold—Stated Account—Interest—Nullity of Judgment—Irregularity—Setting aside Judgment—Terms.

Appeal by plaintiff from judgment of BRITTON, J. (8 O. W. R. 247), in so far as in favour of defendant, upon the trial of an issue directed by an order of the Master in Chambers.

C. Millar and C. McCrea, Sudbury, for plaintiff.

C. A. Moss, for defendant.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., ANGLIN, J.), was delivered by

ANGLIN, J.:—The Master in Chambers directed this issue to determine whether or not plaintiff is entitled to have a default judgment entered against him in an action of George v. Green set aside and vacated. Plaintiff alleged (a) that he had not been served with the writ of summons in that action; (b) that judgment was never actually signed against him; (c) that the judgment entered is a nullity because the writ of summons was not specially indorsed. The trial Judge found against plaintiff upon the question of service, and it is conceded that against this finding plaintiff cannot successfully appeal. On the second point we expressed upon the argument our concurrence in the view of the trial Judge that the signature upon the back of the judgment by the local registrar, under the words "judgment signed 6th October, 1890," was a good and sufficient signing of judgment. Upon the third branch the trial Judge held with plaintiff, but

he imposed terms as a condition of vacating the judgment, to which plaintiff is unwilling to submit. Hence his appeal on this branch, in which he asserts his right to have the judgment vacated unconditionally.

The propriety of directing that a question as to the validity of a default judgment, impugned because of alleged defects in the indorsement of claim upon the writ of summons, should be determined by the trial of an issue, is open to grave doubt. But, as there was no appeal taken from the Master's order, and as the trial Judge has dealt with it, we should, I think, entertain the appeal taken from his judgment.

The questions for determination are: (1) whether the claim made for interest vitiates the special indorsement on the writ in the original action; (2) whether, if that be so, the judgment entered for default of appearance to such writ is a nullity incapable of rectification by amendment, or merely an irregularity which may now be cured by directing that the judgment be amended by confining it to the portion of the claim which was a proper subject of special indorsement; (3) whether, if the judgment be a nullity, the trial Judge had power to impose terms as a condition of vacating it. That he would have such power if the judgment were merely irregular, can scarcely be gainsaid.

The indorsement on the writ of summons in *George v. Green* is: "The plaintiff's claim is for the price of goods sold and delivered by plaintiff to defendant, the account for which goods has been stated between plaintiff and defendant. The following are the particulars:—

"1890

"April 4. To balance due the plaintiff on an account for goods sold and delivered by him to the defendants, and which account has been rendered by the plaintiff to the defendant and admitted by him to be correct and stated between them, and which balance of account has also been rendered by the plaintiff to the defendant and admitted to be correct and stated at the sum of \$2,389 46

"July 29. To interest for 3½ mos. at 6 per cent. 45 79

\$2,435 25

"April 19. By cash	\$50 00	
"July 29. By int. for 3½ mos. at 6		
per cent.	83	50 83
		<hr/>
		\$2,384 42"

The authorities make it clear that a plaintiff can specially indorse a writ with a claim for interest, only where such interest is payable by statute, or by contract, express or implied, and that in the latter case an allegation of such contract must form part of the indorsement.

The only statutory authority for the claim of interest made by plaintiff George is that found in sec. 113 of the Judicature Act: "Interest shall be payable in all cases in which it is now payable by law, or in which it has been usual for a jury to allow it." There being no allegation that the balance claimed is payable at a fixed time by virtue of a written instrument, or of a demand for payment, the case is not within sec. 114. Although it may be clear that in actions upon stated accounts it has been usual for juries to allow interest, we are, I think, bound by decisions of Courts of concurrent jurisdiction to hold that interest upon stated accounts is not, by virtue of sec. 113 above quoted, payable by statute so as to make it a proper subject of special indorsement: *Solmes v. Stafford*, 16 P. R. 78, 83, 85; *Hollender v. Ffoulkes*, ib. 175. Neither is this a case in which interest was before the Judicature Act payable by law.

There is no allegation in the indorsement of a contract for payment of interest, unless such contract be implied from the allegation of an account stated. No such implication arises upon the mere stating of an account, though it may arise if the act of stating the account is accompanied by an agreement for immediate payment: *Chalie v. Duke of York*, 6 Esp. 45; or for payment at a fixed future date: *Mountford v. Willis*, 2 B. & P. 337.

A subsequent demand for payment would bring the case within sec. 114; and see *Pinham v. Tuckington*, 3 Camp. 468. But neither an agreement for immediate payment or for payment at a fixed future date, nor a subsequent demand, is alleged in this indorsement. . . . *Blaney v. Hendrick*, 3 Wils. 205, is merely an instance of a refusal by the Court to set aside a verdict of a jury awarding interest as damages upon an account stated. This case is not an authority for the

proposition that such interest is payable by law or upon contract implied, and that a jury should be instructed that they must allow it.

Notwithstanding some American decisions that an account stated entitles the creditor to interest—see *McClelland v. West*, 70 Penn. 183, 187; *Case v. Hotchkiss*, 1 Abb. App. Dec. (N.Y.) 324, 326; *Patterson v. Choate*, 9 Wend. 441, 446—I think the weight of English authority is against that proposition, and that, in the absence of an allegation that a fixed time for payment was agreed upon or that a demand for payment was subsequently made, or of an account indorsed shewing that the parties had themselves in adjusting their accounts allowed interest upon balances outstanding (*Nichol v. Thompson*, 1 Camp. 52 n.), it cannot be said that a creditor upon an account stated is entitled to claim interest either by law or upon implied contract, though a jury might and probably would allow such interest as damages.

It follows, I think, that the claim for interest made by plaintiff George was not a proper subject of special indorsement.

The judgment in *George v. Green* was signed on 6th October, 1890. At this time there was not the power of amendment of a special indorsement, upon motion for judgment after appearance, now conferred by Rule 603 (3). Prior to this amendment of Rule 603 it was held that a plaintiff seeking such summary judgment must come “with all his tackle in order:” *Paxton v. Baird*, [1893] 1 Q. B. 139; and could not ask to have a defective indorsement made good by amendment: *Clarkson v. Dwan*, 17 P. R. 208; or be allowed to sign judgment for so much of his claim as was susceptible of special indorsement: *Solmes v. Stafford*, 16 P. R. 264, 269, 270; *Wilks v. Wood*, [1892] 1 Q. B. 684, 686. If such amendment should not formerly have been made on a motion for judgment upon which the defendant was represented, a fortiori it would seem that it should not have been made to cure a judgment entered against a defendant in his absence for default of appearance. I cannot understand why, except for the special provision as to default judgments to which I allude below, a plaintiff’s motion for judgment after appearance was properly refused because of a defect in his special indorsement, which he then sought to cure by amendment, if a judgment entered for default of appear-

ance upon an indorsement similarly defective might be amended, when challenged by defendant, as merely a curable irregularity. Osler, J.A., in *Clarkson v. Dwan*, 17 P. R. 208, said, at p. 215: "Had judgment for non-appearance been signed, it must have been set aside." . . .

[Reference to *McVicar v. McLaughlin*, 16 P. R. 450; *Rogers v. Hunt*, 10 Ex. 474; *Smurthwaite v. Hannay*, [1894] A. C. at p. 501.]

The default judgment depending upon an implied admission, and such admission not being presumed except upon a special indorsement strictly regular, the moment it was shewn that the indorsement relied upon was not warranted by some Rule of Court which authorized the special indorsement of writs of summons, the whole foundation on which the judgment rested was gone, and the judgment itself could not stand. An amendment of the indorsement cannot, without a fresh service of the writ, import an admission by defendant of plaintiff's claim. It clearly follows, I think, that a judgment signed for default of appearance to a writ, the indorsement upon which is not a special indorsement authorized by the Rules of Court, would be a nullity, and not merely irregular and susceptible of cure by amendment: *Hoffman v. Crerar*, 18 P. R. 473, 479; *Appleby v. Turner*, 19 P. R. 145, 149. I have not overlooked the language of Osler, J.A., in this latter case in dealing with a Chambers motion for leave to appeal, reported in 19 P. R. at p. 178, where he makes an allusion to the discretion of the Court to decline to set aside proceedings where the applicant is chargeable with laches, but it will be noted that his language is confined to "objections of irregularity," and affords no ground for questioning the proposition that a judgment by default "entirely unwarranted by the practice is a nullity not curable by delay or acquiescence," as enunciated by the Divisional Court: *ib.*, p. 148.

I have so far dealt with the argument presented at Bar in support of the proposition that the judgment here entered was merely an irregularity and not a nullity, which proceeded upon the assumption that a judgment for default of appearance was in the same position as a judgment upon motion under former Rule 739. But this ignores altogether the pro-

was in force when the judgment in *George v. Green* was entered. While under Rule 739 the indorsement was required to conform to Rule 245, which permitted special indorsement "where the plaintiff seeks only to recover a debt or liquidated demand," Rule 711 dealt with the case where "the writ is indorsed with a claim for detention of goods and pecuniary damages or either of them, and is further specially indorsed with a liquidated demand under Rule 245," and permitted the plaintiff, in default of appearance to such a writ, to enter final judgment for the liquidated demand and interlocutory judgment for the value of the goods and the damages, or the damages only, as the case might be. This Rule was not carried into the consolidation of 1897 without change—which may account for its having been overlooked by counsel. But Rule 575 of the consolidation of 1897, if applicable, would be wide enough to cover the present case.

The effect of the provisions of former Rule 711 is discussed by Osler, J.A., delivering the judgment of the Court of Appeal in *Solmes v. Stafford*, 16 P. R. 264, at pp. 270, 271, and its history is outlined in *Hollender v. Ffoulkes*, *ib.* at p. 177; and see *Huffman v. Doner*, 12 P. R. 492.

It follows that, notwithstanding the addition of a claim for interest in the nature of unliquidated damages, final judgment might have been rightly signed for the liquidated demand upon the account stated. As to the rest of the claim, the judgment should have been interlocutory only. Final judgment for the whole claim entered in these circumstances was not, in my opinion, a nullity, but was merely irregular, and, in the circumstances of this case, terms were rightly imposed on setting it aside.

Plaintiff Green was allowed by the trial Judge a definite period within which to accept these terms. Of that indulgence he failed to take advantage. He could not, therefore, complain if his present appeal were now to be simply dismissed with costs. But it may be that if this course can be taken without undue prejudice to the position of defendant George it would not be unfair still to permit plaintiff to defend the original action upon the terms indicated by the trial Judge, and such additional terms, if any, as may seem necessary to fully protect defendant.

If plaintiff so desires, he may apply to the Court for such relief. Unless he gives notice of such an application within one week, however, an order will issue dismissing this appeal with costs.

DECEMBER 7TH, 1906.

DIVISIONAL COURT.

FLEUTY v. ORR.

Negligence—Injury to Person by Omnibus in Highway—Action against Owner—Relation between Driver and Owner—Master and Servant or Bailor and Bailee—Question of Fact—Evidence—Inferences—Review by Appellate Court.

Appeal by defendant from judgment of Judge of County Court of Huron in favour of plaintiff in an action for damages for injuries sustained by her as a result of a carriage in which she was driving being run into by an omnibus driven by one Mullen, who was, as plaintiff alleged, the servant of defendant.

The appeal was heard by MULLOCK, C.J., ANGLIN, J., CLUTE, J.

E. L. Dickinson, Goderich, for defendant.

W. Proudfoot, K.C., for plaintiff.

MULLOCK, C.J.:—The defendant was a hotel keeper at the town of Wingham, and obtained possession of a pair of horses and an omnibus for the transportation of passengers and luggage between his hotel and the railway station. On 2nd October, 1904, he entered into a contract with a man named Mullen, whereby the latter was given the use of the omnibus and horses, and was entitled to keep for his own use all earnings from the omnibus, in consideration of his paying to defendant 70 or 75 cents a day for the feed of the horses and use of the omnibus, and carrying, by the omnibus, free of charge, between his hotel and the railway station, all persons patronizing defendant's hotel.

On the night in question Mullen was driving the omnibus to the station, when he collided with a carriage containing plaintiff, whereby she was injured, and this action was brought to recover damages from defendant because of the injury.

It is contended by plaintiff that Mullen, while thus in personal charge of the omnibus, was the servant of defendant, and that, therefore, the latter was responsible for Mullen's negligence.

Applying to this case the rule stated in *Saunders v. City of Toronto*, 26 A. R. 265, the test as to whether the relationship of master and servant existed between defendant and Mullen is whether defendant had the right to exercise personal control over Mullen when in charge of the omnibus.

The agreement between them is silent upon the point. Nevertheless, its true meaning is, I think, quite apparent.

Defendant's object was to secure free transportation by the omnibus for his guests. Mullen so understood it, and agreed to furnish such free transportation. The attainment of that result was the whole object of defendant, it being immaterial to him who drove the vehicle, provided the desired end was attained. It was no term of the agreement that Mullen was to be in personal charge of the omnibus. So far as appears, it was intrusted to him at his own discretion, to be used or remain idle, except that defendant's hotel should enjoy free service. Subject to this qualification, for the whole 24 hours of each day, Mullen was entitled to the use of the omnibus for his own benefit. The full enjoyment of this right would necessarily have involved changes of horses and drivers. Yet this right he would not have been able to enjoy if he were defendant's servant, for, as his servant, he would not, without his authority, which he had not, appoint other servants in his stead, or hire other horses, on defendant's account. Thus, regard for Mullen's rights makes it necessary to reject the contention that the relationship of master and servant existed between the parties. Apart, however, from this illustration of the impossibility of giving effect to the agreement if Mullen were held to be a servant, it is to be observed that the parties themselves did not stipulate, and defendant never attempted to control Mullen, as to the manner in which he should perform his contract, nor did Mullen submit to defendant's directions. That Mullen considered himself entitled to manage the omnibus according to his own uncontrolled discretion is shewn by the fact that on one occasion, of his own motion and without consultation with defendant, he appointed his son to drive in his place. In one respect only

did defendant assert any right, namely, by requiring the maintenance of a free omnibus service to his hotel. All the acts of the parties shew that their understanding of the arrangement was, that, whilst defendant was to be entitled to the free omnibus service, it was Mullen's right to arrange the means for the attainment of that end. Where such is the case, the result, and not the means of its attainment, being the subject matter of the agreement, the inference is that the relationship of master and servant does not arise: *Goldman v. Mason*, 2 N. Y. Supp. 337; *Hexamer v. Webb*, 101 N. Y. 385. Whether Mullen was defendant's servant is a question of fact, and, there being no conflict of evidence, we are at liberty to draw inferences.

For these reasons, being of opinion that the relation of master and servant was not established, and consequently defendant was not responsible for Mullen's negligence, I find myself, with great respect, unable to agree with the conclusions of the trial Judge, and think this appeal should be allowed with costs and the action dismissed with costs.

ANGLIN, J., gave written reasons for the same conclusion. As to the duty of an appellate tribunal to review inferences of fact drawn by the trial Judge, he referred to *Russell v. Lefrancois*, 8 S. C. R. 335; *Gallagher v. Taylor*, 5 S. C. R. 368; *North Perth Election Case*, 20 S. C. R. 331. Upon the question as to whether the relation between defendant and Mullen was that of master and servant or bailor and bailee, he referred to *Saunders v. City of Toronto*, 26 A. R. 265, 270, 272; *Venables v. Smith*, 2 Q. B. D. 279; *King v. London Improved Cab Co.*, 23 Q. B. D. 281, 283; *Keen v. Henry*, [1894] 1 Q. B. 292; *King v. Spurr*, 8 Q. B. D. 104, 105, 108.

CLUTE, J., dissented, for reasons stated in writing, in the course of which he referred to *Powles v. Hider*, 6 E. & B. 207; *Venables v. Smith*, 2 Q. B. D. 279; *Laugher v. Pointer*, 5 B. & C. 547; *Dean v. Branthwaite*, 5 Esp. 35; *Sammell v. Wright*, 5 Esp. 263; *Quarman v. Burnett*, 6 M. & W. 499, 509; *Patten v. Rea*, 2 C. B. N. S. 606; *Booth v. Mister*, 7 C. & P. 66; *Moreton v. Hardern*, 4 B. & C. 223; *Waland v. Elkins*, 1 Stark. 272; *Fromont v. Coupland*, 2 Bing. 170; *Roscoe's N. P.*, 17th ed., p. 763; *Saunders v. City of Toronto*, 26 A. R. at p. 273; *Stephen v. Thurso Police*

cluded:—

In the present case, I think it cannot be doubted that defendant had control over Mullen while he was running a free omnibus for defendant's hotel, and the accident having occurred during this time, defendant, in my judgment, is liable, and the appeal should be dismissed with costs.

DECEMBER 7TH, 1906.

DIVISIONAL COURT.

GUNN v. TURNER.

Vendor and Purchaser—Contract for Sale of Land—Specific Performance—Title—Recital in Deed more than Twenty Years old—Evidence—Onus.

Appeal by plaintiff from judgment of TEETZEL, J., dated 12th October, 1906, dismissing an action for specific performance. On 9th April, 1906, the defendant contracted to sell to the plaintiff certain lots on the north side of Dupont street in the city of Toronto for \$10,000 cash. Defendant alleged that plaintiff refused to accept the title to the land, and neglected to carry out the contract by the time given him, and that therefore the contract was at an end.

H. S. Osler, K.C., for plaintiff.

C. H. Ritchie, K.C., for defendant.

The judgment of the Court (BOYD, C., MAGEE, J., MABEE, J.), was delivered by

BOYD, C.:—By the provision of R. S. O. 1897 ch. 134, sec. 2 (1), recitals in deeds 20 years old shall be taken to be sufficient evidence of the truth of the matter therein, unless and except in so far as they are proved to be incorrect, and sec. 3 extends the rule to actions, and provides that the evidence of the recital which is declared to be sufficient as between vendor and purchaser shall be *prima facie* sufficient for the purposes of the action. There was no evidence here

given to displace the statement in the deed that the grantee was in 1864 administrator of his father's estate. The piece of evidence adduced that Mrs. Crossley was appointed administratrix ad litem in 1860 for a limited purpose in Ontario, does not prove the statement as to 1864 to be inaccurate or erroneous. The onus was on the purchaser to shew a different state of facts, and he has failed to do so.

Appeal dismissed with costs.

MEREDITH, C.J.

DECEMBER 8TH, 1906.

WEEKLY COURT.

RE GAMBLE.

Will—Construction—Death of Devisee before Testator—Subject of Devise Falling into Residue—Death of One of Two Residuary Legatees and Devisees—Tenants in Common—Lapse as to Lands Devised—Survivor Entitled to Personality.

Originating notice for the determination of questions arising upon the will of Joseph Gamble.

H. Morrison, Lucknow, for the executors.

P. A. Malcolmson, Lucknow, for Mary Ann Carter.

F. W. Harcourt, for infants and other persons represented by him under order of Britton, J., dated 15th November, 1906.

MEREDITH, C.J.:—The will is dated 8th March, 1898, and by it the testator devised to his nephew Michael Gamble a farm in the township of Kinloss, and another farm in the same township to his sisters Mary Ann Carter and Catharine Harbourne, and, after bequeathing a legacy of \$300 to his nephew Wilfred Gamble to be paid by Michael Gamble, and appointing his executors, he devised and bequeathed the residue of his property to Mary Ann Carter and Catharine Harbourne.

Catharine Harbourne died in the testator's lifetime, and, by force of sec. 27 of the Wills Act, the undivided one-half

of the Kinloss farm to which she would have been entitled if she had survived the testator, is included in the gift of the residue.

The residue consists of the Kinloss farm and certain personal property of which the testator died possessed, and the question for decision is, whether the share of the residue which Catharine Harbourne would have taken had she survived the testator, lapsed, and is therefore undisposed of, or whether she and Mary Ann Carter were joint tenants of the subject of the residuary disposition, and the survivor, Mary Ann Carter, is therefore entitled to the whole.

There can be no doubt, I think, that as to so much of the residue as is real estate, the devisees would have taken as tenants in common had Catharine Harbourne survived the testator: R. S. O. 1897 ch. 119, sec. 11; and it follows that as to the undivided half devised to her there was a lapse, and it is undisposed of.

As to so much of the residue as consists of personalty, the residuary bequest is to the legatees as joint tenants, and the survivor is therefore entitled to the whole of it.

It was suggested as leading to a contrary conclusion that the blending together in the residuary gift of the real and personal estate was an indication of a contrary intention, within the meaning of sec. 27 of the Wills Act, but I am not of that opinion.

There is no more reason for thinking that this blending indicates an intention that the beneficiaries should take in the same way as legatees of personal property take, than that it is an indication that the personal property should go as real estate which is devised to two or more persons does under the provisions of sec. 11 of R. S. O. ch. 119. The disposition is not, therefore, taken out of the ordinary rule, and the devise of the real estate is to the devisees as tenants in common, and the bequest of the personal property is to them as joint tenants. . . .

Order declaring the true construction of the will in accordance with the opinion expressed. Costs of all parties out of the estate, those of the executors as between solicitor and client.

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VOL. VIII. TORONTO, DECEMBER 20, 1906. NO. 21

CARTWRIGHT, MASTER.

DECEMBER 10TH, 1906.

MEREDITH, C.J.

DECEMBER 11TH, 1906.

CHAMBERS.

CROWFORTH v. GUMMERSON.

Discovery — Order for Examination of Party — Ex Parte Order—Irregularity as to Place of Examination and Person of Examiner—Setting aside Order—Practice.

Motion by defendants to set aside an order obtained by plaintiff ex parte, under Rule 444, for the examination for discovery of the defendants at a place other than the county town, and before a person other than those mentioned in Rule 443.

Gideon Grant, for defendants.

B. F. Justin, Brampton, for plaintiff.

THE MASTER:—It was contended that there is no provision in Rule 444 requiring notice, as is the case under Rule 477. It is not necessary to decide this point. . . .

The practice here has always been to make such orders only on notice just as in a case of a commission, which it very closely resembles.

In both cases it is necessary, in the interests of justice and fairness, that where the regular course is to be departed from, the opposite party should have the fullest opportunity of seeing that what is proposed is necessary, or at least convenient, and of safe-guarding himself against any possible injury.

It is not necessary to enumerate the serious consequences that might result from such an order being made

ex parte. They will at once suggest themselves. To guard against these it has never been the practice, either under the Rule in question or the analogous Rules 485 and 499, to make the order *ex parte*. Even where the examination is *de bene esse*, some ground of urgency is necessary to dispense with notice: see *Baker v. Jackson*, 10 P. R. 624, and *Holmsted & Langton*, 3rd ed., pp. 708, 709. See too Rule 357, as to when orders may be made *ex parte*.

The order must be set aside. But, as the motion might have been made sooner, and as plaintiff's solicitor seems to have acted only with a view to save expense and possible inconvenience to defendants, the costs may be in the cause.

I would suggest that defendants might agree to an order being made now allowing the examination to be had in the same way as directed by the order in question, if on inquiry they are satisfied that they will not be prejudiced thereby.

I have no material which would enable me to make an order now as on a substantive application. As the case is set down for trial next week, this motion may throw it over in any case. However much to be regretted, this is not the fault of defendants.

Since the argument the copy of the order, with appointment indorsed, has been left with me. From this it appears that the examination could not have taken place, as the hour for the same is left blank.

Plaintiff appealed to a Judge in Chambers.

The same counsel appeared.

MEREDITH, C.J., dismissed the appeal with costs to defendants in any event.

MACMAHON, J.

DECEMBER 10TH, 1906

TRIAL.

PATTERSON v. DART.

Limitation of Actions — Conveyance of Land — Security — Agreement—Default—Redemption—Sale by Public Auction — Possession.

Action for redemption, etc.

W. Mills. Ridgetown, for plaintiff.

W. E. Gundy, Chatham, for defendant.

MACMAHON, J.:—The writ of summons in this action was issued on 29th June, 1905.

The plaintiff, by his statement of claim, seeks to redeem, asks for an account of the rents and profits received by the defendant, and payment of the balance, if any, in his favour.

On 28th March, 1893, the plaintiff conveyed to the defendant lot 1 on the north side of Main street in the town of Ridgetown.

In an action in which the Molsons Bank were plaintiffs, and Archibald Patterson (the plaintiff), James A. Dart (the defendant), James D. Teetzel, and John Turner, were defendants, which was tried in November, 1894, before Chief Justice Armour, judgment was given in favour of the Molsons Bank against the defendants Archibald Patterson, James A. Dart, and James D. Teetzel, for \$1,493.40 and costs, the total being \$1,752.10; and also judgment for the defendant Dart against the defendant Patterson therein for the sum of \$1,857 and interest from 7th November, 1894, and costs to be taxed. It was also declared by the judgment that the deed from plaintiff to defendant was a mortgage only, and that plaintiff was entitled to redeem on payment to defendant Dart of the amount found to be due in respect thereof, and in default a sale of the lands. A reference was directed to the Master at Chatham.

Judgment was on the 17th April, 1895, entered in that action by the Molsons Bank against Patterson, Dart, and James D. Teetzel, three of the defendants therein, for \$1,752.10; and judgment was also on the same day entered in favour of James A. Dart against Archibald Patterson for \$1,857, and interest from the 7th November, 1894, and costs to be taxed.

The Molsons Bank on the 15th May, 1895, assigned their judgment against Patterson, Dart, and Teetzel, to David Waterworth.

By an agreement under seal bearing date 27th April, 1895, between the plaintiff, of the first part, and the defendant, of the second part, the terms of the judgment of Chief Justice Armour are recited, and it is also therein recited that there is no dispute as to the accounts between them, and that they have agreed upon a period for redemp-

tion; and in order to avoid the trouble and expense of a reference, they mutually agree upon a statement of accounts set out therein as to advances made by Dart to Patterson on account of lands up to 1st February, 1895, and the estimated expenditure from 1st February to 1st July, 1895, and an account of the rents received by Dart up to 1st February, 1895, and the estimated receipts from 1st February to 1st July, 1895.

It is then covenanted that "immediately after the taxation of the costs payable by the parties thereto, the total amount payable by the party of the first part (Patterson) to the party of the second part (Dart) shall be ascertained by computing the amounts paid out by and allowed to the party of the second part (Dart), as set forth, including all amounts which will be necessarily paid out by him before 1st July, 1895, and the amount of the judgment above mentioned, with costs, which it was adjudged should be paid by the party of the first part (Patterson) to the party of the second part (Dart), and deducting therefrom the amounts received and which will be received by the party of the second part (Dart) as above mentioned, as well as the costs of the party of the first part (Patterson), payable to him under the judgment, and the said sum so ascertained to be payable by the party of the first part (Patterson) to the party of the second part (Dart), shall be payable by the party of the first part to the party of the second part not later than the 1st day of July, 1895."

"On payment as above mentioned the party of the second part (Dart) agrees to convey to the party of the first part (Patterson) the said lands, subject to the mortgage to the Canada Savings and Loan Company for \$6,000."

It is then provided that in default of payment by the party of the first part (Patterson) of the sum found due on or before 1st July, 1895, the party of the second part (Dart), without notice to the party of the first part, may sell the said lands by public auction and convey and assure the same to the purchaser. And it is agreed that the said property shall be put up at auction, subject to a reserve bid of at least \$7,700, and after an advertisement of at least two weeks in a local paper and by posters, and if there shall be no bona fide bid equal to or greater than the sum of \$7,700 at the said sale, then the party of the first part (Patterson) shall receive credit for the sum of \$1,700 upon his indebt-

edness to the party of the second part (Dart), computed as aforesaid, in the first place in extinguishment of the indebtedness with reference to the said lands, and in the second place in reduction of the amount of the judgment of the party of the second part against the party of the first part. And the party of the first part (Patterson) shall stand absolutely debarred and foreclosed of and from all equity of redemption in and to the said lands. "And these presents shall be considered an absolute release to the party of the second part of all the right, title, and interest and equity of redemption of the party of the first part in to or but of the said lands and premises."

No payment having been made by Patterson on 1st July, 1895, in accordance with the terms of the agreement, defendant on 10th July, 1895, advertised by posters the property for sale by public auction at the Queen's Hotel, Ridgetown, on Monday, 22nd July, 1895, at 2 o'clock; the advertisement describing the premises as being "lot number 1 on the north side of Main street in the town of Ridgetown, and known as the three-storey brick block of two stores now occupied by H. M. Green, hardware, and R. Davidson, gents' furnishings, offices, lodge rooms, etc.; terms 10 per cent. on day of sale, balance in 30 days."

Twenty of the posters are sworn to have been posted up in conspicuous places in the town of Ridgetown. And also that the following advertisement was inserted in the "Standard" newspaper published in the town of Ridgetown, in the issues of that paper of the 11th and 18th July: "There will be offered by public auction at the Queen's Hotel, Ridgetown, on Monday 22nd July, at the hour of 2 o'clock, that valuable property the three-storey block of stores now occupied by H. M. Green and R. Davidson."

It was admitted by plaintiff that the costs referred to in the agreement—which when taxed were to be set off as therein provided—have never been taxed. And he also admitted that up to the issuing of the writ herein no demand had been made by him on the defendant for an account.

The property was put up for sale by auction as advertised, but, there being no bidders at the upset price, it was withdrawn. And the defendant has already credited the plaintiff with the sum of \$1,700; and if not already cred-

ited with that amount he is entitled to credit therefor on his indebtedness as provided by the agreement, and the judgment will shew what the balance is.

It was urged on behalf of the plaintiff that the clause in the agreement as to advertising the property for sale had not been complied with, as the advertisement in the "Standard" newspaper did not contain a full description of the premises, and the property had not been legally put up for sale.

The advertisement in the "Standard" did not contain as full a description of the premises as the posters, but both the posters and the advertisement were intended to meet the eyes of any prospective local purchasers, and what was contained in the "Standard" was amply sufficient for that purpose.

The buildings were burnt down twice, and rebuilt.

The defendant has been in possession of the lands and premises since 27th April, 1895, and any claim the plaintiff may have had was barred by the statute at the time the writ was issued on 29th June, 1905.

There must be judgment for the defendant dismissing the action with costs.

DECEMBER 10TH, 1906.

DIVISIONAL COURT.

POTTER v. ORILLIA EXPORT LUMBER CO.

Appeal to Divisional Court—Decision of Local Master upon Reference for Trial—Appeal Heard by Consent—Sale of Lumber—Rejection of Part—Action for Value—Finding of Master—Interference by Court.

Appeal by defendants from decision of local Master at Barrie awarding plaintiff \$1,062.50 and the costs of this action.

R. D. Gunn, K.C., for defendants.

A. E. H. Creswicke, Barrie, for plaintiffs.

The judgment of the Court (ANGLIN, MAGEE, MABEE, JJ.), was delivered by

ANGLIN, J.:— . . . The record bears the following indorsement: "The parties hereto consenting, it is ordered that all the questions in this action be tried by James R. Cotter, Esquire, deputy registrar and Master of this Court at Barrie, sitting as and for the trial Judge, with all the powers of such Judge."

The local Master, who is not one of His Majesty's counsel, is not a person whom a Judge of the Supreme Court of Judicature might, under sec. 87 of the Ontario Judicature Act, request to preside over a sitting or adjourned sitting for the trial of causes. There is no other power under which the Master could be appointed to discharge the functions of a trial Judge, and if the proceedings before him are not to be deemed *coram non judice*, they must be regarded as taken under a reference made pursuant to sec. 29 of the Arbitration Act. That such was the power which the Judge who presided at the Barrie sittings intended to exercise in referring this action at the request of both parties to Mr. Cotter for trial, there can be no doubt, and the presence, or the significance, of the words "sitting as and for the trial Judge," in the indorsement drawn up by counsel, must have escaped his attention.

However, upon the appeal before us, taken on the assumption that the findings of the Master should be treated as a judgment after trial, appealable to a Divisional Court, counsel for both parties agreed that the reference should be treated as having proceeded under sec. 29 of the Arbitration Act, and that in lieu of defendants appealing to and plaintiffs moving for judgment before a Judge in the Weekly Court, the Divisional Court might hear and deal with the matter as arbitrators, and give final judgment, by which both parties agreed to abide. It is in this capacity that we entertain the appeal, at the express request of counsel for both parties.

Plaintiffs' claim was for the value of a quantity of lumber which defendants had refused to accept from plaintiffs, upon the ground that it did not answer the description of the lumber which defendants had agreed to purchase. Defendants had inspected the entire "cut" of lumber made by plaintiffs, and offered by them in fulfilment of their con-

tract with defendants, and had accepted a very large part of it, but had rejected the portion in respect of which the present action is brought, as not of the character for which they had stipulated in the contract.

Counsel for defendants conceded at Bar that there was evidence before the Master which would support his findings, but he contended that the witnesses who gave such evidence were not qualified to pronounce opinions upon which reliance should be placed as to the quality and classification of lumber, and that the weight of the testimony before the Master sustained defendants' rejection of the lumber in question. . . .

[Reference to the testimony of certain witnesses.]

The question for our consideration is, whether the weight of evidence so overwhelmingly preponderates in favour of defendants that we should set aside the Master's finding in favour of plaintiffs for a portion of their claim.

After carefully weighing the evidence, and taking into account the fact that the Master saw all the witnesses and had opportunities, which we have not, of judging of their credibility and of the value of their testimony, I am of opinion that an interference, which would involve a substitution of our views for his upon these points, would be unwarranted. Nothing is more difficult than to make out a case for reversal of findings of fact upon conflicting evidence, and it is right that such an undertaking should be difficult. Not being satisfied that the Master was clearly wrong, we are not in a position to reverse his apparently carefully considered findings.

Appeal dismissed with costs.

DECEMBER 10TH, 1906

DIVISIONAL COURT.

BARTHELMES v. CONDIE.

Bankruptcy and Insolvency—Assignment for Benefit of Creditors — Right of Creditor to Rank on Estate — Owner or Chattel Mortgagee of Insolvent's Business—Evidence—Representations—Conduct—Estoppel.

Appeal by defendant from judgment of FALCONBRIDGE C.J., in favour of plaintiffs in an action for a declaration that

defendant was not entitled to rank upon the estate of George Dodds, trading under the name of the Prince Piano Co.

J. Bicknell, K.C., for defendant.

W. R. Riddell, K.C., and W. D. McPherson, for plaintiffs.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.), was delivered by

TEETZEL, J.:—Plaintiffs are creditors of George Dodds, trading under the firm name of the Prince Piano Company, and on 9th June, 1904, obtained judgment against both Dodds and the company for \$1,157, and on the same day an assignment by Dodds for the benefit of creditors was duly filed.

Defendant filed with the assignee a claim for \$4,530.

The plaintiffs having given a notice of contestation of defendant's claim, an order was made by a County Court Judge directing that plaintiffs should be at liberty to institute an action in the High Court against defendant for a declaration that the affidavit and claim of the defendant filed with the assignee were invalid and should be disallowed and set aside; and this action was accordingly instituted.

Defendant was an employee of one W. A. Cockburn, and it was established at the trial that defendant had no personal interest in the claim filed by him, and that the money represented by that claim was the money of Cockburn, and that defendant was only his agent or trustee in the matter. That the amount represented by defendant's claim had been paid by Cockburn, either directly to the Prince Piano Company for the purchase money of its original assets, or to its creditors, was abundantly established at the trial.

The Chief Justice of the King's Bench, who tried the case, reached the conclusion that Cockburn was the "actual owner of the business" of the Prince Piano Company, and directed judgment to be entered declaring that at the time defendant filed the claim in question, he was not a creditor of George Dodds and the Prince Piano Company, or either of them, and further declaring that the claim filed was invalid and void.

It is quite apparent from the observations of the Chief Justice that he was chiefly influenced in his conclusion by

to plaintiffs and others, with regard to the Prince Piano Company's business.

These statements, according to plaintiffs' witnesses, were substantially as follows: "He said he had bought one-half interest in the Prince Piano Company." "He asked me if I was open for a proposition to buy out the Prince Piano Company. He was the proprietor." "He told me George Dodds had no interest in it whatever; he said he owned the business, and that Dodds was managing the business for him. He said he had the Prince Piano Company. He was interested in that." "He told me he owned every cent that was in that factory, and that Dodds was not doing what was right, and he was not going to give him any more chance, and he was going to close out the business." "He called at my place and forbid me paying Dodds any money, and said he was the owner, and that the money was to be all paid to him."

In his evidence Cockburn does not specifically deny that he made these and similar statements, but swears that in fact he never for himself bought any interest in the Prince Piano Company business, but that he, in 1900, advanced money for the purchase of the assets of a former business which had failed, for George Dodds, his father-in-law, who was a practical piano maker, and Mrs. Prince, whose husband was also a practical piano maker, and who had been a partner in the insolvent firm, and subsequently made further advances for the purpose of enabling the business to be carried on, taking a chattel mortgage to cover the original and subsequent advances, which mortgage, however, was not registered; and further states that all he said and did from the beginning was in respect of his interest as the chief creditor of the firm, holding a chattel mortgage under which he was entitled to close out the business. That he did make efforts to find a purchaser, in order to realize upon his interests, as Dodds was drinking heavily, and was not attending to the business, and he said he explained the nature of his interest to nearly all the persons he spoke to about the matter.

The right of defendant to rank on the estate of the Prince Piano Company depends upon whether, as a matter of law, upon all the evidence, Cockburn was or was not the

actual owner of the business, in other words, whether Dodds was a mere agent or trustee for him.

While assuming all the alleged statements to have been actually made by Cockburn, and granting that, unanswered, they would furnish the best proof against defendant's right to rank, they are not in this case final or conclusive.

Plaintiffs' claim is not based on estoppel, warranty, misrepresentation, or fraud. They do not pretend to say that in any way plaintiffs acted upon anything that was said by Cockburn, or that their position was in any way changed, or their conduct in any way influenced, in consequence of the statements alleged.

The statements, therefore, not being in themselves the foundation of any independent right of plaintiffs by virtue of the doctrine of estoppel, warranty, or representation, defendant is at liberty to disprove their truth as items of evidence against him. . . .

[Reference to *Heane v. Rogers*, 9 B. & C. 577, 586; *Ridgway v. Philip*, 1 C. M. & R. 415.

In addition to the evidence of Cockburn denying the truth of the statements related by plaintiffs' witnesses, he deposed that in all his statements regarding his interests in the company he had reference to his position as chattel mortgagee, and that it was under the power and authority of his mortgage that he contemplated selling the assets of the company.

It seems to me, having regard to all the circumstances of the case, that the interest he manifested in the business, and his efforts to realize upon it, are quite consistent with his position as holder of a chattel mortgage for a sum nearly approaching the full value of the business, and that his statements and conduct might be fairly referable to his position and rights thereunder.

The conduct of all the parties and the records of the company from beginning to end strongly support this attitude, and are inconsistent with the claim that Cockburn was the owner or partner.

During the latter part of 1899 Mrs. Jennie Prince was carrying on business under the name of the Prince Piano Company, having purchased but not paid for the assets of an insolvent business in which her husband was a partner, and on 24th January, 1900, she and George Dodds entered

if the actual owner of the business, shew the whole indebtedness. I think the conduct during the three years and a half and of their transactions shew that no such contemplation.

Quite independently of the consequence, I am of opinion, with very great evidence of Cockburn, supported as it is by all the parties who were from time to time in possession of the property, and having regard to the evidence by them, and all the recorded acts of omission and commission, the entire absence of the element of estoppel by plaintiffs is completely displaced, and the action should be set aside and the action dismissed.

MAGEE, J.

DE

TRIAL.

RYAN v. PATRIARCH

Arbitration and Award—Submission to Arbitration—Power of Arbitrator to Make Award—Failure to Exercise—Action for Account—Arbitration Pending—No Answer to Action

Action by Peter Ryan against P. J. Ryan on account of moneys received by defendant for the construction and installation of a water plant for the town of Orillia, in which defendant had an interest under certain agreements. Defendant set up certain arbitration proceedings in answer to the action.

R. D. Gunn, K.C., for plaintiff.

J. E. Day and J. M. Ferguson, for defendant.

MAGEE, J.:—It is conceded that the action in which to direct a reference to arbitration proceedings. The submission was made in November, 1904, and was under seal, and binds the parties to abide by the award so as it was made on October, 1904, or any subsequent day. The arbitrators should by writing extend the time for the award.

There was no covenant not to take other proceedings. The two arbitrators named appointed a third, but found that they could not get through by 30th October, and each of them so wrote to the party who had nominated him, but said they would proceed with the arbitration. They did not, however, by writing extend the time for the award. They found the accounts involved, and evidence and vouchers needed, the production of which caused delay, and they had to adjourn from time to time, and had some 40 or 50 meetings, each of the two original arbitrators obtaining from time to time from his nominator explanations, proofs, and vouchers as items came up. The plaintiff appears to have protested from time to time to his arbitrator against the delay and against going on. He did not, nor did counsel, solicitor, or agent for him, attend any of the meetings, nor does it appear that defendant did. The arbitrators seem to have been left to themselves in trying to arrive at the facts and conclusions. Finally, about May or June, 1906, plaintiff positively instructed his arbitrator not to proceed further, and in consequence that gentleman so informed his colleagues, and himself declined to go on, and nothing more was done excepting meeting once as to some items which were then being dealt with. They had done about three-fourths of the work referred to them, but it would still require several months before it could be completed in the ordinary course, and the items and matters yet to be considered are of a more contentious character than those which they have already had before them. It is urged for plaintiff that they can be more effectively dealt with by an officer of the Court, and such is the opinion even of defendant's arbitrator. For defendant it is pressed that the arbitration should proceed, that plaintiff had been cognizant of and assenting to and even aiding in the work done, and expense has been incurred which should not now be rendered useless. The question comes up now by way of defence at the trial.

Assuming that plaintiff's course amounted to an assent to the arbitration being proceeded with, it would be only a parol submission: *Ruthven v. Rossin*, 8 Gr. 370; *Hull v. Alway*, 4 O. S. 375. And, being so, it could not have been made a rule of Court under 9 & 10 Wm. III. ch. 15, nor could an application for stay of proceedings have been made under the Common Law Procedure Act of 1856. sec. 91.

makes submissions of the same effect as an order of the Court, and irrevocable without leave of the Court, only applies by virtue of sec. 2 to submissions in writing. And the same is the case with sec. 6, which allows an application to stay proceedings.

It may be argued that, inasmuch as the law (sec. 10 of the Arbitration Act) attaches to every submission in writing the liability to be extended by the Court, therefore it is always an existing submission in writing, though the time has passed. I am, however, dealing with matters as I now find them, without any certainty that any extension could ever be granted. In *Cooke v. Cooke*, L. R. 4 Eq. 77, practically the same state of affairs existed at the commencement of the action as here, but after action the submission was made a rule of Court, and an order obtained extending the time for the award, and thus reinstating the submission. It was held that it afforded no answer to the action. I must hold that no answer exists in this case.

Both parties to the action reside in Toronto, and so does the defendant's solicitor. The plaintiff's solicitor resides in Orillia, but it is admitted that no evidence will be required from there. As the parties have not otherwise agreed, the reference should be to the Master here to take the accounts, and report, further directions and costs being reserved.

If the parties desire to avail themselves to any extent of the labour or conclusions of the arbitrators, so far as they have gone, a clause to that effect may, by consent, be embodied in the judgment.

DECEMBER 11TH, 1906.

DIVISIONAL COURT.

SCOTT v. JERMAN.

*Contract—Construction—Division of Land—Trespass—Title
—Damages—Scale of Costs.*

Appeal by plaintiff from judgment of MEREDITH, C.J., dismissing an action for trespass to land.

E. Meek, for plaintiff.

T. M. Higgins, for defendant.

The judgment of the Court (BOYD, C., MAGEE, J., MABEE, J.), was delivered by

BOYD, C.:—We think the agreement of 1898 between Scott and Mrs. Torrance was intended and expressed so as to divide the property on the same line of separation as was marked by the line fence put there some years before, when a division of the property into east and west portions was arrived at between plaintiff and defendant. That would give to plaintiff approximately the 28 acres to the east, and the western part approximately 30 acres to Mrs. Torrance. Mrs. Torrance got, besides this, the “bush and water power” forming part of the eastern division going to plaintiff. Defendant’s contention is that this “bush and water power” comprises about 6 acres of land of the eastern portion, but we do not think that can be the proper construction of the words used. The Chief Justice read the agreement as if the word “lot” was added, but that is, we think, not permissible, having regard to all the terms of the writing and the conduct of the parties. Plaintiff since 1893 has used all the eastern part of the lot, which contains accurately only $25\frac{1}{2}$ acres, for purposes of cultivation and pasture, and there was no change in that user after the agreement of 1898 till defendant broke into the land adjoining the watercourse and turned plaintiff’s cows out of it, which gave rise to this action.

The bush is the land covered by the bush, and the “water power” would not carry any of the land—much less the several acres claimed as the water power lot. The only difficulty is as to the use of the words with reference to the 28 acres as being now cultivated by plaintiff. It was not strictly cultivated at the time—it had been cultivated, and it was, as already said, all along used as a pasture field by plaintiff. That use sufficiently satisfies the words used so as to give effect to the acreage of 28 acres, which was kept as his part by plaintiff.

We think the judgment should be entered in favour of plaintiff, and, as the Chief Justice has fixed the amount of damages at \$50 in case his finding should not stand, we accept that as the measure of damages to be paid to plaintiff by defendant. Costs should be on the High Court scale, as plaintiff, after trying in the Division and County

Courts to get redress, was driven into the High Court by the defence raised as to title to land.

DECEMBER 11TH, 1906.

DIVISIONAL COURT.

HOGABOOM v. HILL.

Husband and Wife—Moneys Borrowed on Insurance Policy on Life of Husband of which Wife is Beneficiary—Separate Property of Wife—Business of Wife—Interest of Husband—Moneys Derived from Business—Execution against Husband as Member of Partnership—Property Liable to Satisfy Execution—Declaratory Judgment.

Appeal by defendants from judgment of MACMAHON, J., ante 352.

G. H. Kilmer, for defendants.

I. F. Hellmuth, K.C., for plaintiffs.

The judgment of the Court (BOYD, C., MAGEE, J., MABEE, J.), was delivered by

MAGEE, J.:—The capital put into the Hill Printing Co. was \$954.15. The trial Judge found that \$654.15 of that sum was contributed by the wife, being the proceeds of a loan on the policy in her favour on her husband's life. The balance, \$300, was the proceeds of a loan to the wife from her mother, for which the wife gave as security a mortgage upon certain household furniture. Upon the evidence before him the trial Judge held that the furniture so mortgaged was really the husband's and not the wife's, and he, for that reason, found that the money so borrowed upon its security was also the husband's. It is difficult to understand that such a result was ever contemplated by the mother-in-law, the wife, or Hill himself. There would be every reason why that should not be so. He was then in difficulties. Whether there was an attempted transfer to

the wife of goods which did not belong to her or not, the very last intention the wife and mother could have had would have been to make him possessed of any money which would be so readily traced and become available to creditors if it were his. Though the security furnished for the loan may have been the husband's, the loan itself was obtained by the wife in her own name, on her own liability, and from her relative. To transfer it from her to her husband requires, I think, more than a mere deduction from the fact that she was enabled to get it through his assistance, and in this respect, I think, the appellants' contention is well-founded. Whether the furniture was the husband's or not, the mortgage upon it was in fact paid off out of the business, and the chattels themselves again rendered liable to his creditors, if they ever were so.

Then the result of the judgment appealed from is to declare that the husband and wife were partners and entitled to profits in the proportion of their contributions to the capital. Both disclaimed partnership. If the husband contributed nothing, and had no proprietary interest, the wife would be entitled to all. As the payments on the Lowther avenue property were made by her out of the profits of the business, it follows that if the latter were hers the former would be hers also. Even if the husband were entitled to share in the business, it does not appear that the amount drawn out to be paid on the land for the wife exceeded her share of the profits; rather the contrary is to be inferred from the evidence; there would be no reason why it should be declared to belong to the partnership rather than that her share in the partnership should be reduced by so much. In either case plaintiffs would have no right to the land.

The action thus fails as to both the real and personal property which plaintiffs seek to avail themselves of.

There are other difficulties in their way, which, in the view taken, it is not necessary to deal with. . . .

Appeal allowed and action dismissed with costs.

FALCONBRIDGE, C.J.

DECEMBER 12TH, 1906.

WEEKLY COURT.

RE MILES.

Will — Construction — Residuary Bequest — “Parties Mentioned” in Will who shall be Living at Winding-up of Estate — Corporations — Poor of Town — Period of Distribution — Executors.

Motion by executors for order declaring construction of will of Robert B. Miles, deceased.

V. A. Sinclair, Tilsonburg, for the executors.

W. S. Brewster, K.C., for Joseph W. Porter.

M. F. Muir, Brantford, for E. A. Miles and W. Miles.

J. H. Spence, for Ruth Stuart.

M. C. Cameron, for the official guardian, appointed to represent beneficiaries who have died since the testator, also the poor of Tilsonburg.

G. F. Mahon, Woodstock, for the Woodstock Hospital.

J. M. Godfrey, for Wellington Walker.

W. C. Mikel, Belleville, for the Ontario Institute for the Deaf and Dumb.

No one appeared for the Baptist Church at Burford.

FALCONBRIDGE, C.J.:—The facts of the case and the questions propounded are set forth in the affidavit of Vivian and Elliott, the two executors.

1. The first question is propounded in clause 1 of paragraph 9 of the affidavit. The 52nd paragraph of the will is as follows: “I direct that all the rest and residue of my estate, both real and personal, shall be converted into cash by my executors and trustees hereinafter named, and shall, after the payment of the expenses of winding-up my estate, be divided share and share alike among the different parties mentioned in this my will who shall be living at the time of the winding-up of my estate;” and the 53rd paragraph of the will provides as follows: “I further direct that in case any of the legacies mentioned in this my will shall lapse, the

amount or amounts of same shall become part and parcel of the residue of my estate, and shall be divided or apportioned as in the clause last above mentioned."

I think it is highly probable that the testator intended the word "mentioned" to be the equivalent of "mentioned as beneficiary," but, as eminent Judges both in England and in Ontario have said over and over again in different modes of expression, a Judge is not justified in departing from the plain meaning of words which admit of a rational interpretation, for the purpose of giving effect to an assumed intention. The verb "to mention" is applied to something thrown in or added incidentally in a discourse or writing, e.g., "In the course of conversation that circumstance was mentioned," (Imperial Dictionary.) The Century defines it, "to speak of briefly or cursorily;" and the Standard, "to make slight allusion to." These definitions, then, of leading lexicographers favour the construction which I feel obliged to put upon it—the plain every-day meaning of the word. There is no emphasis in the word, and nothing to justify me in supplying a phrase to fortify it. The answer to the first question will, therefore, be that Joseph W. Porter, Wellington Walker, and Mary Jane Miles, or Phillip, are entitled to share in the residuary estate.

2. The expression "parties who shall be living at the time of the winding-up of my estate" is inapplicable to a corporation, and therefore the Ontario Institute for the Deaf and Dumb at Belleville and the Hospital at Woodstock are not entitled to share in the residuary estate.

3. This objection does not apply to the poor of Tilsonburg who are living—"for the poor shall never cease out of the land"—and this gift is not void for uncertainty; therefore the poor of Tilsonburg will share in the residuary estate, and will also be entitled to the \$6, proceeds of the buggy and the cutter. The corporation of the town of Tilsonburg will take charge of and administer this fund.

4. The "winding-up of my estate" appears to be a matter not dependent upon the will or whim of executors; and the authorities seem to authorize the confining of the time to the one year which is allowed by law, and that one year is therefore the time meant by the "winding-up of my estate." Therefore the representatives of the legatees who were alive at the expiration of the year are entitled to share under the residuary clause.

5. The Baptist church at Burford is not entitled to share in the residuary estate, on the ground stated above.

6. As to the corporations, this has been answered above.

7. The executors are also parties "mentioned in the said will," and are entitled to share in the residuary estate.

Costs to all parties out of the fund.

MULOCK, C.J.

DECEMBER 12TH, 1906.

TRIAL.

BIGGAR v. TOWNSHIP OF CROWLAND.

Highway—Obstruction by Committee of Council of Township—Stakes in Highway to Mark Course of Ditch—Misfeasance—Liability of Corporation for Acts of Committee—Injury to Pedestrian on Highway—Damages.

Action for damages by John Biggar and Margaret Biggar, his wife, against the municipal corporation of the township of Crowland, because of the injury caused to the wife by certain obstructions on the highway.

J. F. Gross, Welland, for plaintiffs.

W. M. German, K.C., for defendants.

MULOCK, C.J.:—The municipal council decided to construct a ditch along the side line between the 8th and 9th concessions of the township of Crowland, under the provisions of the Ditches and Watercourses Act, and, their engineer having prepared the necessary plans and specifications and made the inquiries and award called for by the Act, the council appointed three of their number, namely, the reeve, Mr. Mathews, and councillors Carl and Misner, a committee to meet on the side road where the ditch was to be constructed, and there to let the contract for the work by public competition. Accordingly this committee of council met officially at the appointed time and place, where were assembled a number of the public interested in the letting of the contract, and, in order to indicate to prospective contractors where the ditch was to be constructed, they drove four stakes in the high-

way, one, at least, and perhaps two, of these stakes being on the travelled portion of the road and very near to the centre; the others being nearer the side. They had with them the plans and specifications prepared by the engineer, and the reeve made the measurements shewing where the stakes were to be driven, and councillor Carl, with an axe, drove the stakes at the places pointed out by the reeve. The latter testified that what they did was as a committee of the council; that they considered the placing of these stakes necessary in order to let the contract. Councillor Carl, one of the committee, was examined on behalf of defendants, and states that the stakes were driven into the road in order to indicate how much earth would be required to be removed. The contract was then let, and the stakes were left in position, projecting about 6 inches above the ground, and unprotected by barrier, light, or otherwise. In the dusk of the same evening Mrs. Biggar, with her son Bruce, was returning home on foot, and, when walking along the travelled portion of the road, struck her foot against one of these stakes and was thrown to the ground and seriously injured. Feeling around with her hand, she found the stake, which could not be seen by a person standing up.

The evidence shews beyond reasonable doubt that the accident happened on the travelled part of the highway; that it was occasioned by the obstruction placed and left there by the committee of the council; that it was a dangerous obstruction; and that defendants adopted no precautions in order to prevent injury to the public.

The plaintiffs' cause of action is framed at common law for misfeasance. Defendants seek to treat it as one under the statute for non-repair of the highway.

The plaintiffs' cause of action is framed at common law for misfeasance. Defendants seek to treat it as one under the statute for non-repair of the highway.

I am unable to regard it as a case of non-repair. At common law any obstruction which unnecessarily inconveniences or impedes the lawful use of the highway by the public is a nuisance: Angell on Highways, sec. 223.

It might have been lawful for defendants to have left the stake in the highway if they had adopted proper precautions to prevent danger, as, for example, protecting it with a light, or by driving it so far into the ground that it could

not cause injury, but it was unlawful for them to leave it in a condition that made it dangerous to the public: *Rowe v. Counties of Leeds and Grenville*, 13 C. P. 315; *Clemens v. Town of Berlin*, 7 O. W. R. 35.

Defendants did not neglect any duty to repair. The injury was occasioned by no act of omission on defendants' part to repair, but by an act of commission, the creating of a nuisance on the highway, which was in itself an unlawful act: *McDonald v. Dickenson*, per Osler, J.A., 24 A. R. 43; *Gilchrist v. Township of Carden*, 26 C. P. 1.

Placing an obstruction in the highway and leaving it so unguarded that it endangers the public safety is a nuisance for which an indictment lies, and also renders the guilty person liable to an action at the suit of an individual who has sustained special damage: *Borough of Bathurst v. Macpherson*, 4 App. Cas. 256; *McKinnon v. Penson*, 8 Ex. 327.

If the municipality itself creates the nuisance it is no more exempt from liability than an individual.

I therefore think that the accident in question was caused by misfeasance.

The next question is whether defendants are liable for the act of the committee. Where members of a township council are appointed a committee to perform work for the council, they are servants or agents of the corporation while in the performance of the work: *McDonald v. Dickenson*, *supra*.

The committee were authorized by defendants to proceed to the place where the ditch was to be constructed and there to let the work. It was in the interest of defendants that the ditch should be constructed in the exact place selected for that purpose by the engineer. A disregard of such an important detail might seriously interfere with the efficiency of the work. I therefore think that for the information of tenderers and the guidance of the contractor, and to secure the performance of the work in accordance with the plans and specifications, it was both proper and necessary that the precise location of the proposed work should be marked out on the ground.

In arranging for the letting to be done on the spot where the work was to be performed, and appointing three of their number as agents of the corporation to attend on the spot to let the contract, it must be assumed, I think, that the council authorized the committee to do what seemed to them

expedient, in order to the letting of a contract according to the plans and specifications of the engineer and the decision of the council. Making intelligible to competitors the location of the proposed ditch was information reasonably necessary in order to the carrying out of the instructions of the council to let the contract, and thus for that purpose in planting the stakes the committee were acting in the course of and within the scope of their authority, and for their torts the defendants are liable: *Stalker v. Township of Dunwich*, 15 O. R. 342; *Nevill v. Township of Ross*, 22 C. P. 487; *Gilchrist v. Township of Carden*, supra; *Conrad v. Trustees of Village of Ithaca*, 16 N. Y. 161; . . . *Bayley v. Manchester*, L. R. 8 C. P. 148, 152. . . .

The question as to whether a servant or agent is acting within the scope of his employment or authority is one of fact, and no general rule can be formulated which will determine in each case whether the servant or agent was acting within the scope of his employment or authority, and Teetzel, J., in the unreported case of *Grimes v. City of Toronto*, expressed the view that if the servant is engaged to do work upon a highway, anything done by him in the course of that work or in furtherance of it, or anything omitted to be done that ought to have been done, speaking generally, will create a liability on the corporation.

Being of opinion that defendants are liable for the injury sustained by Mrs. Biggar, the remaining question to determine is the amount of damages. Before the accident she was an able-bodied and remarkably healthy woman. Her age was about 50. She gave evidence on her own behalf, and impressed me as a perfectly truthful and candid witness. The accident was a very serious one; two ribs were fractured; her left knee was injured; and she sustained serious internal injury, causing inflammation of the bladder, and partial paralysis of the throat accompanied by severe pain. She was confined to her bed for 7 weeks.

None of the medical gentlemen who gave evidence spoke with any degree of confidence as to her ultimate recovery, and the reasonable inference is, I think, that there may be some improvement, but she will never recover the full use of her left leg, whilst there is a reasonable probability of permanent impairment of the knee-joint. At the time of the trial it was swollen, being two inches larger than the sound one. Although 7 months had elapsed since the accident, she was

evidently in considerable pain, not only in the knee joint, but in the left side of her body. She can move only with the help of a crutch, but on account of the pain in her left side she is obliged to use the crutch under the right arm and to throw almost her whole weight over on the crutch in order to take a step forward with her right leg. Thus her body must lean out of the perpendicular and far to the right to enable her to lift her right foot off the ground.

From the evidence I entertain no doubt whatever as to the serious nature of the injury, and think it very problematical if she will ever, even after considerable time, have a complete recovery. She has suffered very much and still suffers, and the accident has greatly impaired her general health. The plaintiffs are farm people in a respectable walk of life, and before the accident Mrs. Biggar was an active, industrious woman; a valuable helpmate to her husband. Now she is a charge on him. A grown-up daughter, who had been employed in a factory, has been brought home to wait on her mother. A considerable liability has already been incurred for medical attendance, and more doubtless will follow.

I award to the female plaintiff the sum of \$1,500 damages, and to her husband the sum of \$500. I direct judgment to be entered for plaintiffs for these sums with costs of the action.

MACMAHON, J.

DECEMBER 13TH. 1906.

TRIAL.

LEE v. TOTTEN.

Trusts and Trustees—Breach of Trust—Threat of Litigation—Promise to Make Amends by Will—Compromise—Consideration—Enforcement—Revocation of Will—Claim on Estate.

Action by John C. R. Lee, on his own behalf and as executor of Sophia Lee, deceased, against the executors of Julia Stanton, deceased, to compel defendants to make good to plaintiff out of the estate of Julia Stanton, deceased, the share to which plaintiff was entitled as representing Sophia

Lee, had Julia Stanton by her will provided for Sophia Lee and her representatives equally with other members of the family of William H. Stanton, deceased, or to restore a settled fund and interest, and for administration of the estate of Julia Stanton.

A. C. McMaster, for plaintiff.

H. M. Mowat, K.C., and J. E. Robertson, for defendants.

MACMAHON, J.:—Prior to the marriage of Sophia Stanton with Joseph Smith Lee, a marriage settlement was executed between her intended husband and herself, dated 30th June, 1858, of which William A. Himsworth was appointed the trustee. Himsworth, however, never acted, and the trusteeship was assumed by William H. Stanton, of Toronto, a brother of Sophia Lee.

The settlement provided that "the trustee may pay out and invest the moneys in Government debentures, bank stocks, municipal debentures, or other good security, with authority from time to time to transpose the securities when and so often as he should think fit."

The sum which came into the trustee's hands was \$2,000, which, under the terms of the settlement, was to be "for the use and benefit of Sophia Stanton during the joint lives of said Joseph Smith Lee and said Sophia; and after the death of either of them to the sole and only use of the survivor, his or her heirs and assigns."

The trustee with that fund purchased 50 shares of Gore Bank stock, of the par value of \$40 per share. The bank suspended payment, and on its being wound up there was a loss of \$600 on the investment made by the trustee.

With the remaining \$1,400 of the fund, Stanton, on 2nd April, 1872, purchased 35 shares of Royal Canadian Bank stock at a par value of \$40 per share, the share certificate shewing that Stanton held the stock "in trust for Joseph S. Lee and Sophia Lee."

Mr. Frank Arnoldi said that Joseph Smith Lee released his right by survivorship to the trust fund. This also appears by a memorandum in Mr. Stanton's handwriting attached to exhibit 4.

The trustee in June, 1874, sold two of the Royal Canadian Bank shares for \$80, one share on 5th January, 1897,

for \$40, and two shares in May, 1876, for \$80, the proceeds of which sales were paid to Sophia Lee.

Mrs. Lee had at that time perfect confidence in her brother W. H. Stanton, for on 17th April, 1870, she made a will by which she bequeathed all her estate, including the bank stock, to him in trust for her son John, the present plaintiff.

The Royal Canadian Bank amalgamated with the City Bank of Montreal, and the amalgamated banks were, in 1876, incorporated by 39 Vict. ch. 44, as "The Consolidated Bank," and the 33 shares then held by the trustee became stock of that bank; and of these the trustee sold two shares and paid the proceeds (\$80) to Sophia Lee.

W. H. Stanton died in June, 1879, and his personal estate was sworn to at \$6,000 by his widow, the executrix under the will. It was also stated that he left considerable real estate.

The Consolidated Bank suspended in August, 1879, at which time there stood in Stanton's name as trustee \$1,120 of its stock. On the winding-up, the whole of the stock was lost.

Mr. Arnoldi, representing Mrs. Lee, said he had an interview with Mr. Stanton early in 1879 in relation to the trust fund, when Stanton admitted that he was liable for the loss of the fund, but was not able at that time to make it good, but that in the meantime he would make his sister, Mrs. Lee, an allowance of \$100 a year, and would make the trust fund good to her by his will.

There must be some mistake in speaking of the trust fund having been lost early in 1879, as the Consolidated Bank did not suspend until August of that year, and W. H. Stanton died in June, two months prior to its suspension.

On learning that Mr. Stanton had not, as promised, made provision for Mrs. Lee by his will, but had left all his estate to his widow, Julia Stanton, Mrs. Lee saw Mrs. Stanton, who referred her to Mr. Huson Murray, Mrs. Stanton's solicitor.

Mr. Arnoldi then, on Mrs. Lee's behalf, saw Mr. Murray, who, on 9th October, 1879, wrote him the following letter:—

"Dear Mr. Arnoldi,—I have seen Mrs. Stanton in reference to Mrs. Lee's matter, and while she distinctly repudiates any legal liability whatever, she has assured me that, provided it is left with her as a matter of honour, she will do

what she believes her husband would have done, namely, she will make up to Mrs. Lee as long as she lives, in January and July, the amount which the dividends on her Consolidated Bank stock fall short of \$100 per annum, and should there be no dividends at all, she will then pay her \$100 per annum by half-yearly payments of \$50 each, in January and July, the first payment to be made January next. This is, of course, on the assumption that the shareholders will not be called upon to pay anything. I desire also to say that Mrs. Stanton has, as you no doubt are aware, provided for Mrs. Lee in her will equally with other members of the family."

Mr. Arnoldi states that after receiving that letter he told Mr. Murray that the terms mentioned therein would not be accepted, and there would be immediate litigation unless the matter was amicably arranged; that he then asked to see the will alluded to, which was shewn to him by Mrs. Stanton, dated in 1879, which he said had been duly executed by her, by which she left a share—an absolute gift—(to the best of his recollection, one-fifth) to Mrs. Lee and her representatives.

After seeing the will, Mr. Arnoldi stated he told Mr. Murray that on Mrs. Lee's behalf he would accept the bequest made by the will as being sufficient, and there would be no litigation.

Mrs. Lee died in June, 1898, and up to the time of her death the half-yearly payments of \$50 each were made by Mrs. Stanton.

Mrs. Stanton died on 2nd August, 1905 (leaving an estate valued at \$30,000), having executed a will, dated in November, 1892, by which she bequeathed to Sophia Lee the sum of \$2,000, if she survived the testatrix; and in the event of her predeceasing the testatrix she bequeathed to John C. R. Lee (the plaintiff and son of Sophia Lee) the sum of \$500.

Mr. Murray stated that he was solicitor for Julia Stanton, and that the will executed by her in which Mrs. Lee was named an equal beneficiary with the other members of the Stanton family must have been in existence when he wrote the letter of 9th October, 1879, although he now has not any recollection of its contents, nor does his memory carry him back to the interview he must have had with Mr. Arnoldi prior to that letter being written. He (Mr. Murray) drew the will made by Mrs. Stanton in 1892, but he cannot remem-

ber any discussion at that time as to the contents of the former will, under which Mrs. Lee's share would have been about \$6,000.

While Mr. Arnoldi was threatening proceedings against the estate of W. H. Stanton, of which his widow was the executrix and sole devisee, it is clear from the letter of Mr. Murray that Mrs. Stanton did not consider her husband's estate liable for the loss of the trust fund belonging to Mrs. Lee. But Mr. Arnoldi was of a contrary opinion, and, as already stated, told Mr. Murray that proceedings would be instituted unless the matter was settled. And it was in consequence of his having seen the will referred to in the letter of Mr. Murray that Mr. Arnoldi became satisfied with the generous provision Mrs. Stanton had made for Mrs. Lee, and accepted it as a settlement, and the contemplated litigation was abandoned.

As that will was in existence when the letter of Mr. Murray was written, and as Mrs. Stanton was not prior to the making thereof aware of any legal proceedings being threatened, the provision in the will for Mrs. Lee was the spontaneous act of Mrs. Stanton and of course uninfluenced by the subsequent threats of litigation.

Having communicated to Mr. Murray that he accepted the terms of the will shewn to him, and that no suit would be brought,—which he, on behalf of his client, carried out—there was, I consider, a compromise which might have been enforced had a binding agreement been entered into: *Cook v. Wright*, 1 B. & S., judgment of Blackburn, J., at p. 568; *Miles v. New Zealand Alford Estate Co.*, 32 Ch. D. 266. But Mr. Arnoldi knew that the liberal provision in the will for Mrs. Lee might at any moment be revoked unless there was a covenant against revocation; and it was revoked by the execution of the will of 1882.

Mrs. Stanton is spoken of by the witnesses as a woman of high principle, and not likely to do an act which she would consider unjust, and as in the letter from her solicitor to Mr. Arnoldi she had been insisting that Mrs. Lee's rights "should be left to her as a matter of honour, and she would do what she believed her husband would have done," and as Mr. Murray has no recollection of the former will having been considered when preparing the will of 1882, it is likely that Mrs. Stanton was unmindful of its contents, and made the

bequest in her last will in favour of Mrs. Lee which she believed her husband would have made.

One may regret the conclusion that must be reached, which I consider the inevitable one, that the action must be dismissed, but under the circumstances without costs.

DECEMBER 13TH, 1906.

DIVISIONAL COURT.

RE PRESTON.

Payment into Court—Fund in Hands of Trustee de son Tort—Constructive or Express Trustee—Trustee Relief Act—Infant Cestui que Trust—Jurisdiction of Court to Order Infant's Money into Court on Summary Application—Contract between Original Trustee and Transferee of Fund.

Appeal by Mary E. Preston from order of MABEE, J., in Chambers, directing James Moneypenny, on his own application, to pay into Court a sum of \$1,019.92 in his hands, to which the infant Lois E. Preston was beneficially entitled.

The appeal was heard by MULOCK, C.J., ANGLIN, J., CLUTE, J.

W. E. Middleton, for Mary E. Preston.

W. E. Raney, for James Moneypenny.

ANGLIN, J.:—An insurance policy on the life of the deceased father of the infant was, by indorsement, made payable to the appellant, his widow, Mary E. Preston, "for the maintenance and support" of their child Lois. These moneys were collected for Mary E. Preston by James Moneypenny, her brother-in-law. After they had come to his hands, by arrangement between himself and Mrs. Preston, Moneypenny retained them and employed them in the business of the firm of Dignum & Moneypenny, in which he was a partner. He gave to Mrs. Preston the following acknowledgment:—

" Toronto, March 1st, 1905.

" Mrs. D. M. Preston,
" Philadelphia.

" Dear Madam: We beg to advise you that we hold to the credit of Miss Lois Preston's account the sum of nine hundred and forty-seven dollars and fifty-six cents (\$947.56) bearing interest at the rate of six (6) per cent. per annum, payable quarterly.

" Yours truly,

" Dignum & Money penny."

The evidence discloses that the infant is residing not with her mother, but with Mr. Money penny, by whom she is being supported. After the moneys in question had been in Money penny's hands for more than a year, apparently because of some misunderstanding or quarrel between himself and Mrs. Preston, she demanded that he hand these moneys over to her, and pressed her demand. Believing, as he swears, that Mrs. Preston contemplated marrying again, and that if these moneys were given to her they would be diverted from the purposes of the trust to which they were subject, Mr. Money penny refused to pay over the moneys to Mrs. Preston, and immediately instructed the application upon which my brother Mabee made the order allowing payment in. Mrs. Preston now appeals, on the ground that the Court has not jurisdiction to make such an order. The amount paid in includes the principal sum received by the applicant with interest thereon at 5 per cent. from the date at which he received such principal, less his costs of the application, which were given him by the Judge and were taxed at the sum of \$30. and the costs of the appellant fixed at a like sum.

There can be no doubt that Mr. Money penny took these moneys and kept them with full knowledge of the trust to which they were subject, and must be deemed to have been aware that his retention of them pursuant to the arrangement with Mrs. Preston was in breach of trust. It follows that Money penny was at least a trustee de son tort of these moneys. He was as such accountable to the fullest extent as a trustee for the moneys and for his use of them—accountable not merely as a debtor to Mrs. Preston, but as a trustee to Lois E. Preston, his cestui que trust. By the document which he gave to Mrs. Preston he made himself,

though otherwise perhaps merely chargeable as a trustee by operation of law, an express trustee of this fund. In the circumstances of this case this document is a declaration by Money Penny of an express trust upon which he held the money. His attempt to limit his liability for its use to payment of a fixed rate of interest cannot give him the legal status of a mere debtor.

Being then a trustee, though *de son tort*, and as such liable to account to an infant *cestui que trust*, the applicant, however much at fault, was, I think, entitled to come to the Court, under the Trustee Relief Act, R. S. O. ch. 336, sec. 4, and sec. 2, defining "trustee," and ask to pay the money in his hands into Court, thus relieving himself *pro tanto* of his onerous responsibilities as a trustee. The Court, which, in the exercise of its equitable jurisdiction, imposes upon the applicant the burdens and liabilities of a trustee, will not deny to him relief to which as a trustee the statute would entitle him. *Qua* debtor of Mrs. Preston the applicant had no right to thus discharge his liability; *qua* trustee he may be entitled to be thus relieved *quoad* his *cestui que trust*, the infant. A trustee by operation of law, because of his knowingly retaining trust moneys, an express trustee, I think, by virtue of his own declaration, Mr. Money Penny, in my opinion, rightly asked the Court to allow him to discharge himself as permitted by the Trustee Relief Act. Where, as here, it clearly appears to be for the benefit of an infant *cestui que trust* that payment in should be permitted, the Court may, and I think should, pronounce the order—though in other cases, where the interests of the *cestui que trust* seem not to require it, the Court, in the exercise of its discretion, may refuse to entertain such an application, though made by a person whose status as a trustee is indisputable.

But upon another ground entirely I think the order in appeal may be supported. The Court was apprised—from what source cannot be material—of facts which indicated that money of an infant was, in breach of trust, in the hands of a person who was before the Court. The original trustee, likewise guilty of breach of trust, was also before the Court. The fitness of this trustee to again handle such moneys was seriously in question. A case of jeopardy of infant's money was sufficiently established, had an application been made on behalf of the infant by the official guardian, or by

a next friend, to warrant the Court making an order for payment in of the fund. Jurisdiction to make such an order on summary motion by the cestui que trust is expressly conferred by Rule 938 (d). Mr. Moneypenny, if not entitled, as contended by the appellant, to the privileges, rights, and remedies of a trustee, is certainly subject to all the powers and jurisdiction which the Court can exercise over trustees for the benefit of cestuis que trust. One of these powers is to order payment into Court of any money in the hands of a trustee on motion made on behalf of the cestui que trust.

As custodian of the interests and property of infants, the Court, exercising the jurisdiction formerly vested in the Chancellor, must be able, *motu proprio*, to order that which, upon application of the official guardian or of the infant by her next friend, it could and would direct.

In *Huggins v. Law*, 14 A. R. 383, at p. 394, Patterson, J.A., says: "The jurisdiction of the Court in respect of the property of infants and its power to direct guardians or other trustees in their management of that property, or to take it out of their hands and assume the care and management of it, is not open to dispute. In the exercise of that jurisdiction it may be the general rule of the Court to require that money shall not remain in the hands of the guardian, executor, or other trustee, but shall be paid into Court." He speaks of "the right of the guardian to get in the estate, of whatever it consists, and to manage it until interfered with by the order of the Court."

In *Re Harrison*, 18 P. R. 303, Robertson, J., quotes this language as indicative of the wide powers of the Court in dealing with infants' property and the trustees thereof.

In *Campbell v. Dunn*, 22 O. R. at p. 106, the Chancellor said: "The fund having been brought before the Court by the parties, and there being a contest as to its custody, I will order it to be paid into Court for the protection of the infants."

In *re Humphries*, 18 P. R. 289, the Chancellor again stated the jurisdiction of the Court in very broad language, and held on a summary application under Rule 938 against a trustee, though not made by the infant cestui que trust, that an order for payment in should be made.

These cases indicate the scope of the jurisdiction which the Court exercises for the protection of the property of infants.

If the order in appeal were vacated, and Mrs. Preston were allowed to bring an action to recover this money from Mr. Moneypenny, the moment she should commence such action an order for payment into Court would be pronounced on the application of either party, or on that of the official guardian intervening for the infant, such facts being shewn as are now admitted by both parties, though the solvency, the conduct, and the character of Mrs. Preston were subject to no imputation: *Whitewood v. Whitewood*, 19 P. R. 289.

If there were any doubt of our jurisdiction, it would, I think, be our plain duty before disposing of the present appeal to direct the official guardian to intervene and to make a substantive application on behalf of the infant for the retention of these moneys in Court. But, having no doubt of the jurisdiction under which the order of my brother Mabce was made, I see no reason for putting the infant's small estate to the expense of another motion.

The application for payment in was made to relieve a situation arising entirely from the breach of trust in which the applicant as well as Mrs. Preston participated. Having created the difficulty, he should not, I think, have been allowed to remove it at the expense of the infant. I would, therefore, vary the order in appeal by striking out the allowances to the applicant and to Mrs. Preston of the sum of \$30 each for costs. Of the present appeal, in view of this variation, there should be no costs.

Though the material does not shew it, there is in the acknowledgment of Mr. Moneypenny quoted above, an indication that Mrs. Preston was, in March, 1905, a resident of Philadelphia, Pa. If her residence there lasted for the period of a year, and continued until this application was launched, the order might also be supported under 62 Vict. ch. 15, sec. 3.

CLUTE, J.:—I agree in the result arrived at by my brother Anglin, upon the ground that the respondent, in the facts and circumstances in this case, became a constructive trustee within sec. 2 of the Trustee Relief Act. . . .

[Reference to *Lee v. Sankey*, L. R. 15 Eq. 211; *Lewin on Trusts*, 15th ed., pp. 558, 560, 561, 1141; *Soar v. Ashwell*.

[1899] 2 Q.B. 550, 556, 402, 403, 404; Wilson v. Moore,
1 My. & K. 337; Life Association of Scotland v. Siddal,
3 D. F. & J. 58, 72; Burdick v. Garrick, L. R. 5 Ch. 233.]

Upon the other ground of my brother Anglin's judgment, I desire to express no opinion. . . .

MULOCK, C.J.:—I agree in the conclusion of my brothers Anglin and Clute that this appeal should be dismissed, and propose to refer only to the argument of Mr. Middleton that the dealings between Mr. Money Penny and Mrs. Preston created a legal contract whereby he was bound to repay the money to Mrs. Preston, and that the matters in controversy cannot be treated otherwise than as arising out of such contract.

Mrs. Preston was trustee of the fund for her infant child, and intrusted it to Mr. Money Penny to invest in a mercantile business. Such an investment of this trust fund was a breach of trust. Mr. Money Penny, when accepting the money, knew it was a trust fund, and whilst he was, I have not doubt, innocent of any intentional wrong-doing, nevertheless his action in investing the fund in a mercantile business made him also guilty of breach of trust. So that the transaction resolves itself into this, that the subject matter of the alleged contract is a trust fund, and one of its terms is that this fund shall be illegally invested.

It was not competent for the parties to control the rights of the cestui que trust in respect of the fund by such a contract, which, involving a breach of trust, is fraudulent and void as against the cestui que trust, and therefore cannot stand as a bar to the Court's exercising its equitable jurisdiction in respect of the trust fund in question.

CARTWRIGHT, MASTER.

DECEMBER 14TH, 1906

CHAMBERS.

CRAWFORD v. CRAWFORD.

Discovery—Examination of Defendant—Scope of—Discovery of Mines—Dates and Places.

Motion by plaintiff for an order requiring defendant McLeod to attend for further examination for discovery

and answer certain questions which he refused to answer upon his examination.

W. N. Ferguson, for plaintiff.

J. B. Holden, for defendant McLeod.

THE MASTER:—This action is for an account of the discoveries, other than that of the Lawson mine, said to have been made by defendants under the prospecting agreement referred to in the judgment in *McLeod v. Lawson*, 8 O. W. R. 213. In that case nothing turned on the date of the discovery of the Lawson mine. Here the dates are of importance, as plaintiff alleges and must prove, in order to succeed, that there were other properties, as well as the Lawson, discovered in the same period. In this view it may be helpful to trace the movements of defendants and get from them their account of the matter, and test the accuracy of their statements. It does not seem that by doing so plaintiff violates the order of 17th October precluding him from raising here any issues raised in the previous actions.

The questions which plaintiff wishes to have answered are as to where defendant McLeod camped on 13th and 14th September, and when the Lawson mine was first reached, and how long before its discovery.

The scope of an examination is not to be unduly restricted. It is better that counsel should not be too prompt to object to questions unless plainly improper and irrelevant.

The order should go. . . . Costs of the motion to plaintiff in the cause.

MEREDITH, C.J.

DECEMBER 14TH, 1906.

CHAMBERS.

RE DOMINION BANK AND KENNEDY.

Interpleader—Moneys on Deposit in Bank—Death of Depositor—Will—Judgment Establishing—Rights of Executor—Adverse Claim under Agreement.

Appeal by James Kennedy, a claimant, from an interpleader order made by the Master in Chambers, ante 755.

L. V. McBrady, K.C., for James Kennedy.

W. A. Baird, for Robert Kennedy, the adverse claimant.

W. B. Milliken, for the Dominion Bank, stakeholders.

MEREDITH, C.J., varied the Master's order by directing an issue to decide the question whether James Kennedy, as executor, is entitled to the moneys in the bank. Money to remain in the bank subject to the order of the Court. Liberty to apply reserved to both parties to the issue. Robert Kennedy to be plaintiff. Costs of the appeal, except those of the bank, to be disposed of as in the Master's order. Costs of bank to be deducted from the fund.

FALCONBRIDGE, C.J.

DECEMBER 14TH, 1906.

WEEKLY COURT.

INTERNATIONAL TEXT-BOOK CO. v. BROWN.

Constitutional Law—Powers of Provincial Legislature—Act respecting Licensing of Extra-provincial Corporations—Intra Vires—Company Carrying on Business in Ontario.

A special case stated for the opinion of the Court. The two questions submitted were: first, whether the Act respecting the Licensing of Extra-provincial Corporations, 63 Vict. ch. 24, was intra vires the Legislature of Ontario; second, whether plaintiffs were carrying on business in Ontario so as to bring them within the provisions of the Act.

Hume Cronyn, London, for plaintiffs.

H. S. Blackburn, London, for defendant.

J. R. Cartwright, K.C., for the Attorney-General for Ontario.

FALCONBRIDGE, C.J.:—1. The first question seems upon its face to be a somewhat large one, but I think it may be shortly disposed of as being within the powers of the Legislature of Ontario under sec. 92, sub-secs. 2 and 9, of the British North America Act, as being a mode of direct taxation within the province, or as relating to the issuing of a license in order to the raising of a revenue. The point has

BURTCH v. CANADIAN PACIFIC R. W. CO.

Negligence—Railway—Hand-car—Injury to Child Playing in Street at Level Crossing—By-law of Municipality—Contributory Negligence—Findings of Jury—Duty to Give Warning of Approach of Hand-car—Damages.

Appeal by defendants from judgment of ANGLIN, J., upon the findings of a jury, in favour of plaintiff, a boy of ten, for the recovery of \$1,000 damages in an action for personal injuries sustained by plaintiff by reason, as alleged, of the negligence of defendants.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, J., CLUTE, J.

H. S. Osler, K.C., for defendants.

W. J. L. McKay, Orangeville, for plaintiff.

(CLUTE, J.:—Defendants' railway passes through the town of Orangeville, crossing John street. Plaintiff on 29th September, 1905, while on an errand upon that street, and while passing the point where the railway crosses the same, was run down by a hand-car of defendants, then used by the employees of defendants, and seriously injured, owing, as it is alleged, to the negligence of defendants.

The evidence shewed that plaintiff had stopped on the road to play with other boys, after having delivered certain parcels with which he was sent, and that he was coasting down the incline of John street, in his little express waggon, when the accident occurred. He was sitting in front, steering the waggon, and another boy was behind, facing the opposite direction.

Questions were submitted to the jury and answered as follows:—

1. Were defendants guilty of any negligence which caused the injuries sustained by plaintiff? A. Yes.

2. If so, in what did such negligence consist? A. The negligence consisted of having a close board fence along the west side of street running south from the railway to south of railway limit, also the bank running west along the south side of track, also shrubbery and weeds growing along the wire fence. We consider it negligent in not giv-

street.

3. Did plaintiff omit to take any reasonable care which he should have taken, and which, if taken, would have prevented the occurrence in question? A. No.

4. If so, what such care did he omit to take?

5. Could defendants, after plaintiff's danger became or should have been apparent, have avoided injuring plaintiff? Yes, after it should have been apparent.

6. If so, what could they have done which they did not do? A. We think they could have stopped the car.

7. At what sum do you assess plaintiff's damages? A. \$1,000.

Supplemental question: Was it the duty of defendants, apart from the requirements of sec. 228 of the Railway Act, to have warned plaintiff of the approach of the hand-car which struck his cart? A. Yes.

It was submitted on behalf of defendants that there was no evidence on the part of plaintiff rendering them liable for the accident which happened; and in support of this contention it was strenuously urged that to hold defendants bound to give notice of the passing of a hand-car, in circumstances such as the present, would be for the jury to assume the functions of the Railway Commission; that a railway company using a hand-car in the ordinary manner, and having no obligation imposed upon them by the statute with reference to signals or notice, were not bound to give notice, and for the jury to find that their neglect in so doing was negligence was beyond their competency, in the circumstances of this case . . .

[Reference to Lake Erie and Detroit River R. W. Co. v. Barclay, 30 S. C. R. 360.]

Here the jury do not assume to lay down any general rule as to what care or precaution should be taken. They simply find that, having regard to the condition of the approach to this crossing on defendants' railway, and the circumstances of the case, some warning should have been given. The answer, I think, was unobjectionable. It simply disposed of a case, having regard to certain special circumstances. I think there was evidence to support the finding, and, under the authority of the above case, that the findings of the jury in no way infringed upon the jurisdiction of the Railway Commission.

relied upon by counsel in support of his contention. But that case, in my judgment, does not conflict with the case just referred to. . . . But it is said that the judgment of Davies, J., 34 S. C. R. at p. 97, shews that Parliament by sec. 187 of the Railway Act vested in the Railway Committee, now the Railway Commission, the exclusive power and duty to determine the character and extent of the protection which should be given to the public at places where the railway track crosses the highway at rail level. That section reads as follows: "And the Railway Committee, if it appears to it expedient or necessary for the public safety, may, from time to time, with the sanction of the Governor in council, authorize or require the company to which such railway belongs, within such time as the said committee directs, to protect such street or highway by a watchman or by a watchman and gates or other protection." Having regard to the purview of the section and what is said by Davies, J., I think it clear that it has no application to the present case.

This is not the case of affording protection as indicated in that section, but whether or not, having regard to the peculiar circumstances of the case, notice should have been given by the passing hand-car of its approach.

Having regard to the interpretation clauses of the Railway Act, sec. 2, sub-secs. (t), (aa), and sec. 228, the argument at first glance seems to be complete that the hand-car is a "train" within the meaning of the Act, and that warning should be given under that section.

Mr. Osler sought to get rid of the logical effect of the interpretation clauses as imposing such duty, by urging that sec. 228 so manifestly had reference to an ordinary train that the context required a more limited meaning to the word "train" than would be otherwise indicated by the interpretation clauses. I am of opinion that this is so, and that the above clauses of the Act do not help plaintiff. There was, however, evidence of negligence in not giving warning, which, in my judgment, was proper to go to the jury.

The further question remains as to whether plaintiff has not precluded himself from recovering in this action by his own conduct.

The question of contributory negligence is for the jury. Defendant must, therefore, go further and shew that there

jury. In other words, that his conduct by his own admission is such as to shew that he was the cause of his own injury. He was properly upon the street. The fact that he was playing in the street would not necessarily prevent his recovering if he were injured by defendants' negligence: *Ricketts v. Village of Markdale*, 31 O. R. 180, 610. It is said in *Farrell v. Grand Trunk R. W. Co.*, 2 Can. Ry. Cas. 250, 2 O. W. R. 85, that the *Ricketts* case was cited and doubted by some of the members of the Court of Appeal; but it has not, so far as I know, been overruled. . . .

Reference was made to by-law No. 366 of the town of Orangeville, intituled a by-law to prevent children riding behind waggons, etc. . . . The by-law is in part as follows: "No person shall coast on a handsleigh or sleigh, or tobaggan, or other device, on any street or sidewalk within the municipality of Orangeville; it shall be the duty of the chief constable to notify any child or person doing so of the consequences of violating this by-law, and after a second offence to summon and to bring such child or person before the magistrate."

Murray defines "coasting" to mean, the winter's sport of sliding on a sled down hill, and hence the action of shooting down hill on a bicycle or tricycle. Here the by-law uses the words "other device," and, having regard to the popular meaning of "coasting" and the expression of the by-law, I am of opinion that the by-law is sufficiently broad to apply to the present case. There was, however, no evidence that plaintiff had been warned, and coasting in the street does not appear to be an offence punishable under the by-law until the accused is warned, although it is something which the town council desired to prohibit in the manner indicated. But I do not think defendants are entitled to avail themselves of the by-law as an answer to plaintiff's claim. It was probably admissible as evidence for what it was worth, as shewing the action of the municipality in regard to the rights of children playing upon the street; but it was manifestly passed to prevent sport of that kind from interfering with the ordinary use of the street, and I do not think a by-law passed for that purpose can be invoked by the railway company for another purpose. . . .

[Reference to *Gorris v. Scott*, L. R. 9 Ex. 125.]

Physicians and Surgeons of Ontario under the Ontario Medical Act, removing the appellant's name from the register.

Section 36 of the Act gives the right to a medical practitioner whose name has been erased to bring the whole matter before a Divisional Court for review, and the Court may order the restoration of the name so erased, and also make such order as to costs as to the Court may seem just.

The appeal was heard by BOYD, C., MAGEE, J., MABEE, J. W. F. Kerr, Cobourg, for the appellant.

H. S. Osler, K.C., and J. W. Curry, K.C., for the College.

BOYD, C.:—This lengthened inquiry has resulted in a mistrial. To manifest this it is necessary to consider the proceedings briefly.

The charge as originally launched on 24th January, 1903, was that Alexander Crichton "did in the years 1902, 1903, and 1904, cause to be issued to the public and the drug trade circulars and advertisements as to the efficacy of 'Grippura' as a cure for grippe and influenza, and that he in so advertising was guilty of infamous and disgraceful conduct in a professional respect."

There was no publication in the newspapers, but the objectionable circular was sent by mail to various persons—"intelligent persons," says the accused—selected from names in the directory and Bradstreet. The circular is in the form of a broad-sheet (22 by 14 inches in size), except that it is printed on both sides, and contains a miscellaneous jumble of testimonials, references to different diseases, commendation of "Grippura," information about the appellant himself and his discovery, and quotations as "to many important discoveries being fearfully hindered and opposed at the start."

At the opening of the investigation particulars of the charge were sought, but this was refused by the prosecution, on the ground that all might be found in the circular.

The appellant was then questioned at large under oath as to all the circulars, including that of 1905. Substantially they are the same; and as to all that is stated therein respecting his secret remedy "Grippura" and its power to cure certain ailments and alleviate certain others, he affirms the truth or his belief in the truth. The testimonials printed from persons benefited are all genuine, and generally it was

spoken of by the witnesses for the
was nothing in the wording of the
objectionable character." . . .
of it I am objecting to—the claim
objectionable." . . .

The accused declined to disclose
preparation, but offered to submit
in the hospital and to have it "sifted"
expressed it.

It was also proved that the accused
Arts in the University of Toronto
Classics; that he had studied and
medicine in the Toronto School, and
since 1892.

Four physicians were examined
their evidence in the main agrees
accused in keeping his remedy a secret
its benefits publicly was disgraceful
fessional point of view under the stand-
remedy was a good one. But they
of what is claimed, and, though they
ture, and have not any practical know-
expert opinions in contravention of
the statements of the accused and
underlying belief in the minds of the
may be thus expressed: the fact of
a secret indicates fraud; the fact of
indicates quackery.

Dr. Ferris explains his point of
is right, the circular might not prove
at the present time it would be. . .
ject to test at the hospital, and if
is not misleading."

Dr. Douglas (who was formerly
says: "I believe the object is to deceive."
Ferris thinks it "not intentionally
las proceeds: "This conduct is little
who, he explains, "is a man who advertises
he can do a certain thing, and gets paid for
what he advertises is no good." And
to the public, because I don't think
he claims." He places no value on
says medical people are best able to

with Dr. Ferris that it would be a fair test to submit the preparation to be applied in a hospital.

Dr. Henderson says the claims the accused makes are objectionable unless they were proved to be true, and further that the accused's own experience and the testimony of laymen are not proper tests or proofs.

The accused then put in a Presbyterian and a Methodist clergyman and an old resident of Castleton (where the accused practised), who proved that he had a good reputation for honesty, integrity, and truthfulness. These witnesses also spoke generally of the benefits they and their families had derived from the use of "Grippura."

Upon these materials the committee of inquiry reported on 5th February, 1905, that they had failed to arrive at a conclusion, and asked leave to consider further the evidence, exhibits, and the case generally. In submitting this report, the chairman said that all agreed that it was disgraceful conduct and came under the statute . . . that, although from all the facts the advertisements and statements were such as were very misleading to the public, and had the effect of taking money out of the people's pockets, yet the committee had never recommended that any man should be struck off for advertising alone—there has always been something more in connection with it. . . . He did not feel that the case was sufficiently strong to bring in a verdict against the accused. . . . It is a very difficult case. . . . The accused firmly believes he is doing what is right. He thinks he is sent to help poor suffering humanity for consideration. If the consideration was not there, I don't think he would do it. . . . We do not want to report a man where the evidence is, in our mind, not quite strong enough. . . . If counsel says this evidence is not sufficient, we will try to get some more.

It was then referred back to the committee to take further proceedings if the accused did not stop advertising.

The second notice of proceedings to erase the name was served on 27th April, 1906, alleging that the appellant had been guilty of infamous and disgraceful conduct in a professional respect, and giving in the notice, as particulars, these: "That he did infamously, improperly, and unprofessionally, advertise and distribute advertising circulars claiming to have discovered a remedy which would cure La Grippe or influenza in a few hours (and assist in curing a number of

inquiry in reference to the said remedy should be sent to him, etc., and that said advertising pamphlets were distributed to some of the residents of the county of Ontario and throughout the province."

In answer to a letter from the appellant's solicitors asking for full particulars as to wherein the advertisement or circular was infamous or disgraceful, the solicitors for the College made response referring to the words quoted, and saying: "No further particulars necessary; the mere fact of Crichton permitting his name to be used in connection with an advertisement of a patent medicine, which apparently this is, is sufficient to bring him within the wording of the Act. We cannot see that we can give any further particulars."

Thereupon and thereafter the inquiry was resumed, and a second trial had, with the taking of further evidence in addition to what had been given on the former inquiry.

The rule of law in such trials is that the accused person is not to be taken unawares—full particulars should be given so that he may be fully apprized of what he is being specifically charged with: *Re Washington*, 23 O. R. at p. 309. The charge was not substantially varied from what it was at first, and the new evidence given was not essentially different from the old, with this single exception that "Grippura" had been meanwhile analyzed, and its ingredients reported as being about 8 per cent. of hydriodic acid and the rest glycerine and water. This analysis was *ex parte*, and the accused asserts that, in addition to these, there are other ingredients, which he does not disclose.

Dr. Crichton was again called, and repeated his honest belief that all the statements were true. He referred to Dr. Smith, a medical graduate of Queen's (not licensed in this province), who writes that after using 30 bottles (not personally, I assume), he was convinced that many of the statements in the circular are true. The accused also repeats his offer to have the medicine tested by other doctors in fair cases, or in any hospital.

The prosecution then called Dr. Pyne to prove his analysis. He said it is disgraceful to advertise something and get money by it when it will not cure; it would be misrepresentation and misleading. "That composition would cure nothing that I know of. I would not say it is impossible to cure any-

thing, but I do not know that it does." "It is because it is against professional etiquette (to advertise cures and to keep remedies secret) that I say it is disgraceful and infamous; that is from a doctor's point of view." "If the statements are true, I would not consider it disgraceful in an ordinary person to publish, but in a doctor it is contrary to rules laid down by the Ontario Medical Council, and would be disgraceful."

I would just note here that the accused was admitted to practice before these rules were passed by the council.

Dr. Pyne continued: "Hydriodic acid is not in the British Pharmacopœia; it is not recognized as an official preparation; it is hardly used at all. It is supposed to act as an alterative and lowerer of the temperature, but that does not seem to be stated on very good authority. . . . It is possible it may have that effect."

Dr. Field, having heard read the analysis, said: "As to 'Grippura,' it is absolutely worthless; I never tried it for grippe." In re-examination he is asked: "It would be imposing on the credulity of the people?" A. "Yes; obtaining money for something which was not true." Mr. Kerr (counsel for the accused) objects to the leading, and asks, "If it does what they say the people are not being defrauded?" A. "If it does what he says, they are not."

Dr. Ferris, again examined, says it was infamous to withhold a saleable remedy from the profession, if it was, as claimed, of general benefit, and that the statements in the circular are infamous and disgraceful from a medical standpoint.

Upon all the evidence the committee then made a written report to the council finding proved the charge that the accused did infamously, disgracefully, improperly, and unprofessionally advertise, and also that the accused endeavoured to impose on the credulity of the public for the purpose of gain by attempting to deceive such persons as might read the said advertisements.

My brother Mabey comments on the refusal to furnish particulars and to supply a copy of the first evidence, and on the apparent neglect of the council to read or master all the evidence, and I agree with his observations on these points.

I proceed to what was said by and before the council when the report was adopted.

Dr. C. said: "The question is a very simple one. It is not whether this man has violated any code of ethics or not . . . it is not whether he has advertised or not. The question is simply this: he is an educated man, medically educated, and a graduate of the College. Can an educated medical man, acquainted with the action of drugs, advertise to the whole community that a remedy which he keeps secret, but which consists of a few drops of hydriodic acid, will cure any particular disease and every case of it in an hour or two? Is that fraud or not?"

Dr. H.: "It is fraud, of course."

Dr. B. (Chairman of committee): "This man has had two trials; there was evidence taken at both of these trials, and . . . I maintain that he has been conducting a fraud, and . . . the council cannot do anything else than strike him off the register."

The President: "Not to punish him, but to protect the people."

Upon which the motion to adopt was carried, one member not voting and one member voting "nay."

The report was thus affirmed, with its rider disclosing a new phase of the investigation, the result of which was that the bona fides and truthfulness of the accused are negatived, and his fraudulent and deceitful conduct affirmed.

Without taking him to task on these grounds, it is in effect assumed that he did not and could not believe in the efficacy of his alleged discovery; that what was put forth in his circular was false; that acting as an imposter he seeks to impose upon and lead astray a credulous public; and that his whole conduct was fraudulent with intent to deceive the community for his own personal gain.

Surely, in an investigation of such serious moment, involving professional extinction to the party inculpated, there should have been at the outset the charge formulated in this respect of fraud and falsity. The whole evidence for the defence must have assumed a very different aspect, had the prosecution been framed and conducted on these lines.

Standing with the simple yet comprehensive charge that the man advertised his business setting forth the curative virtues of his medicine (which of itself, in the opinion of the witnesses, constituted infamous and disgraceful conduct from

a professional point of view). this was covertly diverted during the course of the proceedings, so that in the issue it is found that the statements in the circular were false; that he knew them to be false; that he made them with intent to deceive and impose on the public; and that the whole system of falsehood and imposition was merely for the purpose of making money. . . .

No doubt, the provincial legislation was suggested by the provision found in the English Medical Act of 1858, 21 & 22 Vict. ch. 90, sec. 29. By this, if a medical practitioner was, after due inquiry, adjudged by the medical council to have been guilty of infamous conduct in any professional respect, his name might be erased. The council were made the sole judges, and no appeal lay if one was found guilty by the council after due inquiry. But internal evidence indicates that the real origin of our statute is sec. 13 of the English Dentists Act of 1878 (41 & 42 Vict. ch. 33), by which it is enacted that if a person registered as a dentist has been guilty of any infamous or disgraceful conduct in a professional respect, he shall be liable to have his name erased by the council. Other provisions follow as to trivial offences, etc., which are found in our legislation, thus ear-marking its origin. The section of the Ontario Act applicable to this prosecution first appeared as a new provision by way of amendment to the existing Medical Act in 1887 (50 & 51 Vict. ch. 24, sec. 3), which is now found in R. S. O. 1897 ch. 176, sec. 33 (j). Power is given to the Council to erase the name of any registered physician who has been guilty "of any infamous or disgraceful conduct in a professional respect." These words have been treated in the mouths of witnesses as if the last word was "aspect" and not respect. The meaning of the statute is not what is "infamous or disgraceful" from a professional point of view, or as regarded by a doctor, and as construed in the light of the written or unwritten ethics of the profession: it is whether his conduct in the practice of his profession has been infamous or disgraceful in the ordinary sense of the epithets and according to the common judgment of men.

The language of the English Judges on the like words in the Medical Act afford a good definition.

In *Allinson v. General Council of Medical Education*, [1894] 1 Q. B. 750, 761, Lord Esher, M.R., and his brethren, construe the words "infamous conduct in a professional respect" thus: "If it is shewn that a medical man in the

practice of his profession has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency—then it is open for the medical council to say that he has been guilty of infamous conduct in a professional respect.”

The meaning is, perhaps, made more clear when we couple with this the words of Bowen, L.J., speaking as to the Medical Act: “Upon a charge of infamous conduct in some professional respect, the particulars which should be brought to his attention in order to enable him to meet that charge ought to be particulars of conduct which if established is capable of being viewed by honest men as conduct which is infamous. . . . If nothing is brought before the tribunal which could raise in the minds of honest persons the inference that infamous conduct had been established, that would go to shew there had not been a due inquiry.” *Leeson v. General Council of Medical Education*, 43 Ch. D. 366, 383-4.

In *The Queen v. General Council of Medical Education*, 3 E. & E. 525, Crompton and Hill, JJ., treated the phrase “infamous conduct in a professional respect” as equivalent to “infamous professional conduct.”

Now, the essence of the inquiry here (not as it was begun, but as the committee regarded it at the end) was falsehood or no falsehood, fraud or no fraud, deceit or no deceit.

As said by Halsbury, L.C., in *Beneficed Clerk v. Lee*, [1897] A.C. 226, 230, “a false statement made knowingly in order to gain some benefit is, whatever is the subject matter of the statute, and in every sense of the term, an immoral act.” And as to “defraud” and “deceive” one cannot find a more terse or happy elucidation of the meaning than is given by Buckley, J., in *In re London and Globe Finance Corporation*, 10 Mans. B. C. 198, 202: “To deceive is to induce a man to believe that a thing is true which is false and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit; by deceit to induce a man to act to his injury. To deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action.”

Thus tested, how stands the evidence? The statements made were believed to be true by the accused, and he is a

good repute for truth and integrity. The fact of "Grippura" being efficacious is attested by the written certificates of people of intelligence and of well-known reputable character—some of them also of medical learning. As a proof of bona fides, the physician offers to submit his medicine to any fair test. And in the books and pamphlets laid before us it is manifest that hydriodic acid is now well known and is accounted to be of varied excellence by American physicians—against whose competence no suggestion has been made.

On the other hand, expert opinion is offered of the worthlessness of hydriodic acid by gentlemen of the medical profession who do not know and have not used or tried the acid. Surely the better plan is to waive matters of personal etiquette and have the thing brought to a practical and satisfactory as well as scientific test by skilled observers in applied medicine.

The broad distinction between the Washington case, 23 O. R. 299 (from which judgment the framers of the "rider" in this case appear to have borrowed their language) and the present, is that there the accused dared not or would not or did not deny what was charged against him—by his silence he in effect confessed its truth and admitted his falsehood: see p. 310. The false statement there acted upon by the council and confirmed by the Court as sufficient to be "infamous" was the representation that persons in the last stage of consumption were suffering from catarrhal bronchitis, and that he could cure them.

Now, I am far from belittling the importance of professional ethics in regard to physicians or other learned professions. There is no doubt that this man has grievously offended against the conventional rules, well recognized, though, it may be, not forming a written code, which obtain among the members of every learned and honourable profession. In two respects he has violated proper decorum: modesty and propriety have been forgotten in his self-advertising and discreditable proclamations; and he has, in the second place, kept to himself and for himself an apparently valuable remedy, and has not made known the formula in order that its benefit may be shared in by the profession and the public.

But neither of these offences against the comity of the profession invites, *per se*, imputation of moral delinquency

—which is, I think, connoted by the terms “infamous” and “disgraceful.” Yet obnoxious conduct is sufficient to put the offender practically outside of the professional pale, but whether it can call down the statutory punishment of exclusion from practice seems to me, as at present advised, to be answerable in the negative.

To revert to the advertising question. The English rule against it, even in the most modest form, is exceedingly strict; not so in America and Canada, where a moderate and limited use of advertisement is permissible. One reason of the rule (though there are others) grew out of the desire to mark emphatically the distinction between a trade and a profession. In the case of a mere money-making business, advertising in any and every extreme of extravagance and exaggeration is considered a legitimate outcome of sharp competition. The professional man, however, is not on this plane; he is not to thrust himself forward and solicit patients by any form of public appeal. It was regarded in the profession as a badge of charlatanism to advertise in any but the simplest way of giving notice of the whereabouts of the practitioner's office. The venders of patent medicines and proprietary remedies might puff their wares and publish their testimonials and tout for customers; but not the physician. No doubt, as said by Dr. Brudenel Carter: “Medical men, from the necessity of living, have become indifferent to the censures of the body of the profession, or to the knowledge that they are offending against the great consensus of professional opinion. They have a living to get, and they get it by such means as offer themselves. Competition induces struggling physicians to follow courses not always consistent with self-respect, and which fall short of a high standard of honour and propriety.” 11 *International Journal of Ethics*, p. 28. This is the shelter under which the appellant takes refuge, and, though his action may be undesirable and reprehensible, derogatory to himself and injurious to the higher interests of the profession, it perhaps has to be left to himself as to its discontinuance.

To deal further with his “secretiveness,” as a witness calls it. The rules which govern English medical practice (e.g., those promulgated by the Royal College of Physicians and Surgeons) forbid the use of secret remedies and methods of treatment, and the rule is enforced by appro-

nostrums) are special preparations of which the formulae are unknown in whole or in part. The reason why they should not be encouraged is because it is unscientific to prescribe a dose of anything the nature of which the physician does not know. Hence it easily follows that if one discovers something which proves of real efficacy in disease the ethical claims of the profession persuade, if not compel, him to place his discovery at the disposal of his brethren and the public, without other reward than professional approval and public esteem.

If, however, a stronger compulsion arising out of his own needs and the stress of competition among the members of a crowded profession overmaster the ethical claim, and he retains control and proprietorship of his nostrum, then he has to incur the condemnation of his fellows, in placing money-making above the high standard of his profession.

There is, however, a distinction marked in the cases between patent and proprietary medicines. Patent medicines are properly those the component parts of which are of record in the Patent Office, and any one can by inquiry find out of what they are made up, whereas the ingredients of a nostrum or proprietary medicine can only be ascertained by analysis: *Pharmaceutical Society v. Armson*, [1894] 2 Q. B. 720, 726. It is permissible for the physician to prescribe this kind of patent medicine, and even as to nostrum there is this to be observed: if knowledge exists or is obtained of the substantial ingredients entering into the composition of the secret remedy, then its use might be justified both by the discoverer and other members of the profession: *Dr. Saundby's Medical Ethics* (1902), p. 67.

I think there is no doubt but that the substantial ingredient which gives importance to "Grippura" has been laid bare by analysis, and that it is sufficiently made known to the profession to indict the next step (which I venture to recommend), viz., to apply the practical test as to its alleged efficacy in various ailments.

If the use of hydriodic acid in this and other like preparations known and prescribed by United States physicians is in truth an agent of varied use and value in the treatment of diseases, it is surely a thing to be taken up by the profession and applied to public needs. If, after satisfactory testing, it stands approved, it will not need to be

generally prescribed and distributed by the profession and used by their patients.

There appears to me to be a good suggestion in the view presented by Dr. Saundby (though he writes of cases which do not respond to the usual treatment.) He writes: "The application of new methods of treatment and of new remedies ought not to be undertaken without due and good cause. The general reason for such experiments is the impossibility of progress without the trial of new suggestions, and on particular grounds the remedy may be resorted to if there is reasonable prospect of its affording relief, and that it is harmless." *Medical Ethics* (1902), p. 55.

Upon the present evidence it does not appear to be proved (always assuming honesty and fair dealing to begin with) that the alleged discovery is a mere pretence; that the remedy is worthless and neither cures nor helps those who take it; that the whole scheme is a delusion; that it is put forward dishonestly or carelessly not for the good of the public but for the gain of the advertiser.

If, however, it fails to stand the scientific as well as the empirical testing, the situation may be very materially changed. The question after that would probably be whether he could reasonably and sincerely retain faith in the virtues of "Grippura" and honestly recommend and advertise it on that footing.

The medical council does not appear to possess such extensive power to discipline and exclude delinquents as has been given by the legislature to the Law Society. To the Benchers is intrusted power to inquire into the conduct of lawyers who are charged with professional misconduct or with conduct unbecoming a member of the Law Society: R. S. O. 1897 ch. 172, sec. 44. Under such language there is power to deal with cases where the charge is violation of the conventional or other regulations which are either prescribed or commonly observed in the profession: see *Ex p. Pyke*, 6 B. & S. 703, per Cockburn, C.J.

So to more limited extent in medicine, if one has been admitted to practice on certain explicit conditions, and has given an undertaking to observe these (e.g., a promise not to advertise in any offensive way), his breach of that engagement might well be regarded, if wilfully and deliberately

and again in the same connection in *Partridge v. General Council of Medical Education*, 25 Q. B. D. 90, 95.

That element is wanting in the case now in hand; at all events no definite delinquency is charged in that respect; for no code of medical ethics was in force here till about 1898; before that time the matter of conforming oneself to medical ethics or etiquette rested in the honour and good sense of the individual.

The conclusion I reach is that there has not been a due inquiry in this *Crichton* case, and the appeal should be allowed. As a consequence his name (if struck off) should be restored to the register; but this judgment is to be without prejudice to the question whether on subsequent inquiry there may not appear to be proper grounds for erasing his name. This is the term which was imposed in the *Partridge* case, 25 Q. B. D. 95.

As to costs: I cannot say that this proceeding has been frivolous or vexatious: the conduct of the appellant has been such as to provoke complaint and to invite investigation. He has offended against the provisions of the Ontario code of ethics which declares it to be derogatory to the dignity and prestige of the profession to resort to these practices of secrecy on the one hand and publicity on the other—which, though not in force when he was registered, yet declare the professional standard of conduct which he has disregarded, to set up a trade-standard for himself, so that while in the result he may be right legally, he is wrong professionally. Having regard to these and like considerations, I do not think that the council, who are discharging a quasi-public duty, should be called upon to pay costs of the investigation or of this appeal.

MAGEE and MABEE, JJ., concurred, for reasons stated by each in writing.

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MEREDITH, C.J.

DECEMBER 4TH, 1906.

CHAMBERS.

MONTGOMERY v. RYAN.

Jury Notice—Striking out—Separate Sittings for Jury and Non-jury Cases—Practice.

Motion by plaintiff to strike out the defendant's jury notice in an action upon a promissory note, in which the venue was laid at Toronto. The motion was addressed to the discretion of the Court, and was not based upon irregularity.

W. N. Ferguson, for plaintiff.

W. M. Hall, for defendant.

MEREDITH, C.J.:—I think the jury notice must be struck out. It is a matter of discretion whether it should be or not. While the practice where the venue is laid out of Toronto is not, except in very rare cases, to make an order in Chambers, but to leave the matter to be dealt with by the trial Judge, a different practice is adopted where the venue is laid where there are separate sittings for the trial of jury and non-jury cases, the latter practically a continuous sitting throughout the year; and in such cases, where the action is one that plainly ought to be tried without a jury, in order to prevent the jury list being incumbered with such cases, thereby involving a very considerable expense to the city, county, or province, because other jury cases would have to wait while such a case was being tried without a jury, the practice is to strike out the jury notice.

This is plainly a case which would be tried without a jury—a case of investigation of accounts.

The order must go. Costs in the cause.

CARTWRIGHT, MASTER.

DECEMBER 17TH, 1906.

CHAMBERS.

HAINES v. YEARSLEY.

*Summary Judgment—Rule 603—Action on Promissory Note
—Defence—Note given on Conditional Undertaking.*

Motion by plaintiff for summary judgment under Rule 603 in an action on a promissory note given by defendant to plaintiff.

R. U. McPherson, for plaintiff.

C. P. Smith, for defendant.

THE MASTER:—Defendant's affidavit sets out the transaction which led to the giving of the note. He then says (paragraph 6) that plaintiff "suggested that I should give my promissory note for \$1,000, and that he would hold same and would not negotiate it, and that he would not call upon me for payment of same unless and until I collected the amount thereof from (one) Henderson." The following paragraph alleges that "in pursuance of the request, for the purposes and subject to the conditions in the paragraph preceding, I gave to plaintiff the promissory note in question."

There is no impeachment of this affidavit; plaintiff's contention being that no such defence can be set up according to the well-established principle as to written contracts.

The defendant relies on sec. 21, sub-sec. (2), clause (b). of the Bills of Exchange Act, and sec. 88, and cites Commercial Bank of Windsor v. Morrison, 32 S. C. R. 98.

After considering the matter, I think that defendant should be allowed to submit his contention to the Court.

its validity can be tried as on a demurrer, if the facts are not in dispute.

The motion is dismissed; costs in the cause. Defendant should in every way facilitate a trial of the action.

DECEMBER 17TH. 1906.

DIVISIONAL COURT.

HORWOOD v. MACLAREN.

Architect—Work and Material Ordered for Building—Absence of Authority from Owners or Contractors—Warranty of Authority—Personal Liability—Principal and Agent.

Appeal by defendant from judgment of MABEE, J., at the trial, in favour of plaintiffs for \$295 and costs, in an action for the price of work and material.

Glyn Osler, Ottawa, for defendant.

E. F. Burritt, Ottawa, for plaintiff.

The judgment of the Court (MULOCK, C.J., ANGLIN, J., CLUTE, J.), was delivered by

CLUTE, J.:—Plaintiffs are stained glass manufacturers; defendant is an architect practising in the city of Ottawa.

In the spring of 1905 defendant was employed by the trustees of the Cobden Methodist Church to prepare plans and specifications and supervise the construction of a new church at Cobden.

The whole contract was let to one Simpson, including the windows in question.

Defendant admits that he was not authorized either by the contractor Simpson or the trustees to enter into a contract for either of them.

According to plaintiffs' evidence, the defendant telephoned plaintiffs asking them to put in a tender, which they did. The following is a copy:

Mr. J. P. Maclaren,

" 104 Sparks Street,
Ottawa, Ont.

" Dear Sirs:—In reply to your inquiry re Methodist Church in Cobden, we beg to quote you the sum of \$340 for all windows shewn on elevations and pointed out by you. being two large windows, one front and side entrance, transoms, two single lights east, two tower lights, two double lights west, one light in choir, three lights entrance to choir, three single lights rear. Design to be similar to one sent you. Quotation includes

2 vents 1 ft. 8 in. x 2 ft. 6 in., large window.
2 vents 1 ft. 7 in. x 2 ft. 6 in., west.
1 vent 2 ft. 9 in. x 2 ft. 6 in., choir.
1 vent 2 ft. 2 in x 2 ft. 2 in., entrance to choir.
1 vent 2 ft. 2 in x 2 ft. 2 in., rear.
2 vents 2 ft. 2 in x 2 ft. 2 in., east.

And the whole properly placed in church finished complete. with all freight and cartage paid by us, scaffolding necessary for placing supplied by committee.

" Hoping to be favoured with your esteemed order, we are.

" Yours truly,

" H. Horwood & Sons,

" per C. G. Horwood,

" Mgr."

Some time after, being at defendant's office on other business, C. H. Horwood, one of the plaintiffs, asked defendant about the tender, and he was told to go on with the work, and he thereupon made the following entry in his memorandum book: "J. P. Maclaren, architect, ordered windows for Cobden Church." Plaintiffs took the necessary measurements, and completed the work. Simpson, the contractor, offered to put them in, and plaintiffs, being very busy at the time, instructed him to do so, and shipped the glass to his address at Cobden, and he put them in for plaintiffs and sent them his bill. This amount has been deducted from the price by the trial Judge, and the judgment entered is for the balance.

Plaintiffs, not having received payment, applied to defendant, who stated that he could not give a certificate un-

that there was trouble at Cobden, and requested them to send their bill to the trustees. Plaintiffs replied that they "had been dealing with the committee through him," as they understood, and had no suspicion of any trouble, and informed defendant that they held him or the committee responsible for the work. The committee repudiated all responsibility, as they had let the contract to Simpson, and plaintiffs were not aware that the Simpson contract included this glass, but on the contrary were told by defendant that they would be paid by the committee direct. Simpson became insolvent in September, 1905, and assigned all moneys coming to him under the contract to a bank, to whom the payments were made by the committee, in part without the architect's certificate. Plaintiffs had in fact no contract, either with Simpson or the trustees, but furnished the glass at the request of defendant, supposing that he was authorized by the trustees to order it. The glass and work were accepted, but the trustees, having paid the assignee of the contractor in full for the contract, refused to pay plaintiffs.

The evidence of defendant conflicts somewhat with the facts as given by plaintiffs. The Judge has given effect to plaintiff's evidence, and I cannot say that he is wrong in so doing.

Upon the facts as offered by plaintiffs, I am of opinion that defendant has rendered himself liable. He invited the tender, held out that plaintiffs would be paid by the trustees, and, plaintiffs having acted in good faith and furnished the glass at his request, and the trustees not having authorized defendant to make them liable, rendered himself liable, on breach of the implied warranty, that he had such authority. I do not think the Statute of Limitations can help defendant, if at this late date he were allowed to plead it. It has, I think, no application to the present case. The goods were in fact furnished and accepted by all concerned; there is not and never was any dispute as to their quality. The whole difficulty has arisen by the architect taking upon himself to do that which he had no authority for doing, and, however hard it may be, he must suffer the consequence.

Appeal dismissed with costs.

BOOTH v. CANADIAN PACIFIC R. W. CO.

Appeal to Divisional Court—County Court Appeal—Right of Appeal—Appeal from Order of County Court in Term Dismissing Motion for New Trial in Action Tried by a Jury—County Courts Act, sec. 51.

Motion by plaintiff for an order quashing an appeal by defendants from an order of the County Court of Carleton. in term, dismissing defendants' motion for a new trial. upon the ground that no appeal lies from such an order.

W. E. Middleton, for plaintiff.

D'Arcy Scott, Ottawa, for defendants.

The judgment of the Court (MULOCK, C.J., ANGLIN, J., CLUTE, J.), was delivered by

CLUTE, J.:—The County Courts Act, R. S. O. 1897 ch. 55, sec. 51, governs appeals to a Divisional Court. Sub-section (4) provides that where there has been a trial with a jury, a motion for a new trial shall be made to the County Court.

This case was tried by a jury.

If plaintiff is entitled to succeed in this motion, the effect is that in a case of this kind no appeal can be had to a Divisional Court, and the question is, whether the intention of the legislature was to limit an appeal, in a case of this kind, to the County Court. Sub-section (1) provides that any party to a cause or matter in the County Court may appeal to a Divisional Court from the judgment directed by a Judge of the County Court to be entered at or after trial in a case tried without a jury, and also in any case tried with a jury to which sub-sec (4) does not apply. This clause would seem to contemplate a certain class of cases, to be tried with a jury, in which there is an appeal to a Divisional Court.

In *Donaldson v. Wherry*, 29 O. R. 552, the jury found in favour of defendant, and judgment was entered in his

the County Court Judge in term made an order setting aside the verdict and judgment, and ordering judgment to be entered for plaintiff. It was held that an appeal by defendant from the order of the County Court Judge in term lay to a Divisional Court. Street, J., points out that the right under sub-sec. (1) of appeal to a Divisional Court in that case was not taken away by sub-sec. (4), because it was not an application for a new trial.

In *Irvine v. Sparks*, 31 O. R. 603, it was held that an appeal did not lie from a judgment of the County Court setting aside a verdict and ordering a new trial, the appeal having been taken under sub-sec. (4).

In *Leishman v. Garland*, 3 O. L. R. 241, 1 O. W. R. 22, there was an appeal by plaintiff to a Divisional Court from the judgment of the senior Judge of the County Court, in term, setting aside the judgment of the junior Judge of the same Court in favour of the appellant at a trial without a jury. It was there held that the motion was properly made under sub-sec. (2) and not under sub-sec. (4), and none the less so because, in the alternative, a new trial was moved for; sub-sec. (5) providing that if the party moves before a County Court under sub-sec. (2) in a case in which he might have appealed to the High Court, he shall not be entitled to appeal from the judgment of the County Court to the High Court, but the opposite party shall be entitled to appeal therefrom to the High Court.

It was strongly urged by Mr. Scott that the judgment in the previous appeal in this case from the County Court was decisive of the present motion, and that the appeal should be heard.

At the first trial of this action before Judge MacTavish and a jury, judgment was given for plaintiff on the answers of the jury. An application was then made in term for a new trial or for judgment for defendant, and judgment was thereupon given in favour of defendant, from which plaintiff appealed to a Divisional Court, and objection was taken to the motion being heard, on the ground that the Court had no jurisdiction to entertain the appeal, and *Leishman v. Garland* was cited in support of the objection. The Court, however, held that such an appeal lay. It will be seen that the facts on that application were the reverse

of the present. The judgment entered on the findings of the jury having been reversed in term, the Court held that an appeal lay. In the present application the County Court in term confirmed the decision of the jury.

The present case having been heard by a jury, and the judgment entered at the trial upon the findings of the jury having been confirmed in term by the County Court, I think there is no appeal in such a case to the Divisional Court, and the present appeal should be quashed.

MOSS, C.J.O.

DECEMBER 17TH. 1906.

C.A.-CHAMBERS.

BURKE v. TOWNSHIP OF TILBURY NORTH.

Appeal to Court of Appeal—Leave to Appeal from Order of Divisional Court—Trifling Amount Involved—Unimportant Questions—Jurisdiction of Drainage Referee.

Motion by plaintiff for leave to appeal from order of a Divisional Court (ante 457), reversing judgment of CLUTE, J., at the trial.

J. Bicknell, K.C., for plaintiff.

Featherston Aylesworth, for defendants.

MOSS, C.J.O.:—The action is for trespass to plaintiff's land, and the trial Judge awarded her \$10 damages and full costs of action.

A drain was being constructed under the provisions of the Drainage Act along the highway in front of plaintiff's farm, and the trespass complained of consisted in spreading earth excavated from the drain upon a small portion of plaintiff's property.

The trial Judge found that plaintiff's land at the place in question was worth about \$10 an acre, and that no more than half an acre was injured, so that, as he said, the whole value of the land itself would only be about \$5.

The action is, therefore, one which should not have been brought in the High Court in the first instance. But, through

an inadvertence it was said, defendants in their statement of defence denied all the allegations of the statement of claim, which involved a denial of plaintiff's title, and for this reason the trial Judge awarded costs on the High Court scale, observing that but for that fact he would have felt great hesitation in making any order as to costs.

It appears that in the statement of claim it was alleged that the trespass was upon the south-west part of plaintiff's lot, whereas in point of fact it was upon the north-west part, and it is not improbable that in endeavouring to meet this statement defendants stumbled into a denial of plaintiff's title.

Defendants, among other answers to plaintiff's claim, objected that the case was one which fell exclusively within the cognizance of the Drainage Referee, under sec. 93 of the Drainage Act, as amended by 1 Edw. VII. ch. 30, sec. 4. The trial Judge thought otherwise, but the Divisional Court agreed with defendants' contention, and dismissed the action.

Plaintiff now seeks to carry the case to appeal for the purpose, as it is said, of having the question settled. So that in a case of little more than a technical trespass to land worth \$5, and in an action which only an inadvertence in the pleadings rendered proper to be maintained in the High Court, one more decision is sought upon the question whether, on the facts, plaintiff should or should not have resorted to the Drainage Referee for her \$5 compensation.

Whether the point involved is or is not yet in doubt, notwithstanding the unanimous decision of the Divisional Court—as to which it is not necessary to express an opinion at present—I think encouragement should not be lent to the prolongation of this litigation. The amount at stake is so trifling, and the matter of so little consequence except to the parties immediately concerned, that the discretion given by the Judicature Act should not be exercised in favour of a further appeal.

There are other grounds of defence open to defendants upon an appeal which are not without weight, and in respect of which the Judge who delivered the judgment of the Divisional Court indicated a view favourable to defendants, and it is possible that success on the question of forum would not mean ultimate success to plaintiff.

Motion refused with costs.

DRUMMOND MINES CO. v. FERNHOLM.

Vendor and Purchaser—Contract for Sale of Land—Specific Performance—Inequitable Contract—Discretion—Appeal—Mistake or Fraud.

Appeal by plaintiffs from judgment of TEETZEL, J., at the trial, dismissing without costs an action by purchasers for specific performance of a contract by defendant for the sale of 10 acres of land. The trial Judge found that the contract was valid, but held that it would be inequitable to enforce it against defendant. He dismissed it without prejudice to plaintiffs bringing another action for the rectification and enforcement of the contract, or for the return of the part of the purchase money paid.

T. D. Delamere, K.C., for plaintiffs.

G. T. Blackstock, K.C., for defendant.

The judgment of the Court (FALCONBRIDGE, C.J., BRITTON, J., MAGEE, J.), was delivered by

FALCONBRIDGE, C.J.:—The trial Judge has specifically found that it was not the intention of either of the parties that Fernholm should dispose of his house and barn and improvements as part of the agreement. He also finds that it would be inequitable and unjust to enforce the contract against Fernholm, because it certainly is not the real bargain he intended to make.

These findings appear to be justified upon the evidence of Fernholm. This defendant is a Swede, and manifestly labours under extreme disability when undergoing straight cross-examination in a language with which he is but imperfectly acquainted. The learned Judge has accepted his story in the main, notwithstanding some statements which are not quite reconcilable with each other.

Mr. Blackstock, at the close of the evidence in reply, challenges the plaintiffs, saying, "I propose to comment upon it if Wright, the officer of plaintiff company who made

contradicted. I would have thought that the Judge's expressions are equivalent to, or would justify, a finding that there was either a mutual mistake or fraud in the written document.

However, the Judge bases his decision on the ground that the circumstances make it inequitable for the Court to interpose for the purpose of a specific performance. The letter of 26th August, 1905, . . . which is relied upon by plaintiff as depriving the agreement of its inequitable character, is purely illusory. It is not executed by the company; it is not even signed by Wright as manager; and it leaves Fernholm entirely at Wright's mercy as to what particular two acres should be chosen and allotted to him. I am of opinion that, even putting the case upon the lower ground upon which the Judge has chosen to place it, he has exercised a judicial discretion in the matter, and that his judgment is right. The judgment appears to be sufficiently favourable to plaintiffs in that the action was dismissed without costs, and without prejudice to any action which plaintiffs might be advised to bring for rectification and specific performance, or for return of the purchase money.

In my opinion, the appeal ought to be dismissed with costs.

DECEMBER 18TH, 1906.

DIVISIONAL COURT.

LUDGATE v. CITY OF OTTAWA.

Highway—Non-repair—Injury to Pedestrian—Snow and Ice on Sidewalk—Notice to Municipal Corporation—Gross Negligence—Damages.

Appeal by defendants from judgment of MABEE, J., ante 257, in favour of plaintiff for \$250 in an action for damages for personal injuries sustained by plaintiff owing to a fall upon a sidewalk in the city of Ottawa, alleged to be dangerous owing to its condition by reason of snow and ice.

Applying the law as laid down in the Drennan case and in the charge of the Chief Justice of the Common Pleas (with which I entirely agree) set out on p. 54 of the report in 27 S. C. R., it does not seem to me that the trial Judge can be said to be wrong in his finding.

The plea of contributory negligence is disposed of by *Gordon v. City of Belleville*, 15 O. R. 26.

The motion should be dismissed with costs.

FALCONBRIDGE, C.J., gave reasons in writing for the same conclusion, referring to and distinguishing *Mahoney v. City of Ottawa*, 3 O. W. R. 695.

BRITTON, J., concurred, for reasons stated in writing.

CARTWRIGHT, MASTER.

DECEMBER 19TH, 1906.

CHAMBERS.

BURNS v. CITY OF TORONTO.

Jury Notice—Irregularity—Striking out—Action against Municipal Corporation—Non-repair of Highway.

Motion by defendants to strike out jury notice as irregular under sec. 104 of the Judicature Act.

John T. White, for defendants.

T. N. Phelan, for plaintiffs.

THE MASTER:—Mrs. Burns, one of the plaintiffs, "fell into an open sewer which had been dug in the street by the defendants," and was injured. The statement of claim then proceeds to say that her injuries "were caused by the negligence of the defendants in not securely guarding said sewer and making the same safe for passengers using the said street." And she claimed damages for her injuries.

It was contended that the failure of defendants to guard the excavation was not non-repair within the meaning of the Act.

But, in view of the recent decisions in *Armstrong v. Township of Euphemia*, 7 O. W. R. 552, and *Hobin v. City of Ottawa*, 8 O. W. R. 589, I do not think this argument

can succeed. Here plaintiff's claim is based on an omission on the part of the corporation which rendered the highway unsafe for those entitled to use it. Had the excavation been alleged to have been unlawful, the matter would have been otherwise.

All the authorities are given in the cases cited.

The motion is granted: costs in the cause.

CARTWRIGHT, MASTER.

DECEMBER 19TH, 1906.

CHAMBERS.

PATTERSON v. TODD.

Practice—Motion to Dismiss Action—Want of Prosecution—Refusal to Dismiss—Terms—Change of Venue—Speedy Trial—Costs.

Motion by defendant to dismiss action for want of prosecution.

The action was commenced on 13th March. The statement of claim was not delivered until 20th June. The statement of defence was delivered on 24th August, and plaintiff joined issue on 1st September. The venue was laid at Brockville, where the jury sittings were held on 1st September. On 10th September notice of trial was given for the non-jury sittings on 6th December instant.

After the examination of plaintiff on 15th November, his solicitor concluded that the action must fail. On 27th November he wrote to defendants' solicitor to that effect, and stated that he would not enter the action for trial, and that he would so inform his client. The 3rd December was the last day for setting down, and the solicitor at once wrote to plaintiff as above stated.

Plaintiff did not acquiesce in this view of his case, which he was ready to have tried on 6th December. He accordingly went back to Brockville and took other advice, and on 12th December an order was taken out appointing a new solicitor. He, however, was not aware that notice of trial had been given when first consulted on 30th November, and accordingly thought the action could not be tried at that sittings. He did not in fact receive the papers until after 3rd December.

argued on 14th December.

C. A. Moss, for defendants.

Grayson Smith, for plaintiff.

THE MASTER:—It was argued that the action had already been virtually put an end to by the letter of 27th November of plaintiff's solicitor.

This, however, is not a necessary conclusion from that letter, as it states that the client was to be informed of his solicitor's opinion. Plainly this was to give him an opportunity of taking other advice, if he desired to do so.

In any case the present motion implies that the action is still pending. The motion itself was justified in view of the action having begun so far back and two sittings having been allowed to pass without its being brought to trial. The next sittings at Brockville will not be until 16th April, and plaintiff says he is ready for trial. If defendant so desires, plaintiff must go to trial at the ensuing Ottawa assizes. This change of venue will really be for the convenience of the parties and their witnesses and a saving of expense, as Ottawa is much nearer and easier of access to Burritt's Rapids, where plaintiff resides and his witnesses no doubt also, than Brockville, and defendant resides in the county of Carleton. Subject to this condition, the motion will be dismissed, but the costs of and incidental thereto will be to defendant in any event.

OSLER, J.A.

DECEMBER 19TH, 1906.

C.A.—CHAMBERS.

MATHEWSON v. BEATTY.

Court of Appeal—Leave to Appeal Direct from Judgment at Trial—Amount Involved—Reasons for Granting Leave—Form of Order—Recital.

Motion by defendants for leave to appeal direct to the Court of Appeal from the judgment at the trial.

F. E. Hodgins, K.C., and W. N. Ferguson, for defendant.

R. McKay, for plaintiff.

OSLER, J.A.:—For the purpose of this application, I may properly hold, upon the affidavit filed and the note of the judgment, that the amount involved is upwards of \$1,000. There is a judgment for damages for timber already cut: \$565, followed by a judgment for an injunction restraining defendants from removing the timber remaining on the lots, sworn to be of the value of \$800 or thereabouts, which, if the judgment is wrong, the defendants, by the very terms of the judgment, must lose if it stands. So I think that I have jurisdiction to make the order. I think also that I ought to make it, as a Divisional Court would probably feel itself bound to follow the judgment of a former Divisional Court in *Dolan v. Baker*, 5 O. W. R. 229, 10 O. L. R. 259, upon which, as counsel inform me, the trial Judge acted.

An order, therefore, is granted giving defendant leave to appeal direct to this Court, passing over the Divisional Court.

The order should recite, "and it appearing that the matter in controversy in the appeal exceeds the sum or value of \$1,000 exclusive of costs, and therefore that an appeal would lie from the decision of the Court of Appeal to the Supreme Court of Canada."

Costs of the application to be costs in the cause.

BOYD, C.

DECEMBER 20TH, 1906.

TRIAL.

KNILL v. GRAND TRUNK R. W. CO.

Railway—Injury to Land by Laying Double Tracks—Action for Damages—Remedy by Arbitration under Railway Act—Farm Crossing—Blocking by Heaping up Snow—Actionable Wrong—Limitation of Time for Bringing Action—Blocking of Drains—Assessment of Damages—Costs.

Action to recover damages for injury to plaintiff's farm by the laying of tracks by defendants across it.

BOYD, C.:—Part of the damages claimed in this case arises from the defendants having so raised the new line of rails forming the double track where it crosses plaintiff's

alleged, by the impossibility of stopping a loaded team to shut the farm gate on the upward grade, so that it requires either a smaller load to be carried or a man to be employed to shut the gate, so as to keep out cattle from the track while the load is being driven across. This difficulty arises from the construction of the double track, and is a matter to be redressed by compensation under the Railway Act, and not by way of action (see sec. 120), unless negligence or want of authority to construct on the part of defendants is alleged and proved. There is no evidence before me to shew want of authority or negligence in construction on their own land of the second track, upon the part of defendants, so as to give a right of action on this matter of the inconvenient crossing.

In the other matter of complaint, the taking up of planks, and blocking of crossing in 1904-5 by heaping up or shovelling up snow thereon by defendants, that would be, I think, an actionable wrong, if the action had been brought in time, i.e., within one year after the injury resulted from the piling up of snow and taking away of planks—but this action, begun on 15th November, 1906, is outlawed by sec. 242 of the Railway Act.

This leaves as the only cause of complaint the damage suffered from blocking of the drainage and piling up of the tiles, which I thought at the trial was a liability of defendants, for which I now assess the sum of \$40 damages. I feel the less regret at this result of the litigation when I recall the fact of plaintiff's application to the Board of Commissioners with a view of getting the crossing redressed, and his refusal to comply with the reasonable terms imposed by them under sec. 198.

Judgment for \$40 and no costs.

As to the exclusive jurisdiction over farm crossings being vested in the Board of Railway Commissioners, see *Grand Trunk R. W. Co. v. Perrault*, 36 S. C. R. 671.

As to the regulation and construction of drainage facilities, jurisdiction being in the Board of Railway Commissioners, though the Court may enforce the payment of damages for lands injured by improper backing of water, see *Langlois v. Grand Trunk R. W. Co.*, Q. R. 26 S. C. 511.

LONDON AND WESTERN TRUSTS CO. v. CANADIAN FIRE INSURANCE CO.

Fire Insurance—Subletting of Premises—Change in Nature of Risk—Notice to or Knowledge of Assured—Landlord and Tenant—Control of Landlord.

Appeal by plaintiffs from judgment of FALCONBRIDGE, C.J., ante 273, dismissing an action by the liquidators of an insolvent company, the owners of a building in the town of Sudbury, insured by defendants for 3 years from 4th October, 1904, and destroyed by fire on 30th November, 1905, to recover the amount of the insurance.

The substantial defence was that the insolvent company leased to one Ferres, a Syrian merchant, a portion of the insured building, and that Ferres took possession thereof and put and kept therein for sale a stock of merchandise, and carried on the business of a merchant, which change of occupation was material to the risk, which thereby became a mercantile one, and more hazardous than that described in the application for insurance.

G. C. Gibbons, K.C., for plaintiffs.

N. W. Rowell, K.C., for defendants.

The judgment of the Court (BOYD, C., MAGEE, J., MABEE, J.), was delivered by

BOYD, C.:—This case requires that the legal effect of the statutory condition as to change of risk in a fire policy should be considered, as found in R. S. O. 1897 ch. 203, sec. 168 (3).

It is laid down in . . . Am. & Eng. Encey. of Law, 2nd ed., vol. 13, p. 286, that under the usual form of policy it is avoided only by an increase of risk by any means within the knowledge or control of the assured, and therefore such an increase, if unknown to him or not within his control, is not fatal. To support this text is cited *Brenner v. Liverpool, etc., Ins. Co.*, 57 Cal. 101, 21 Am. R. 703, and the Canadian case *Heneker v. British America Assurance Co.*, 14 C. P. 57.

state, having the stipulation that "increased by any means within the of the assured," it shall be void: 19 the cases cited is the one relied on Nebraska v. Christian, 2 Neb. 572, 48 Am. St. R. 407. This case, in which our statute, decides that where a tenant's knowledge or consent of the insured, increased the risk, it does not avoid the policy, unless it also has the effect that an increase of risk renders it void.

So in a very late case from Kentucky, British Ins. Co. v. Union Stockyards, where the words of the condition are copulative, as suggested during the trial, the disjunctive "control or knowledge" was, as here, subsequent to the policy, the policy was not avoided by the tenant's increases in a more hazardous way without the consent of the insured, and otherwise than allowed by the policy.

But the most satisfactory case in this line is binding upon us, if it is not distinguished. It is British America Assurance Co., 14 Q. B. 360, there pointed out by Adam Wilson, J. The tenant, during the lease, was as much interested in the land for his limited interest as the owner. The fee, is for his larger interest. The tenant cannot enter upon his tenant, unless by agreement, to the effect, without becoming a trespasser. The tenant were the merest stranger—and during the lease he may build as much as he pleases (with the consent of the landlord) so long as he does not exceed the lease (says) the change had been made with the consent of the landlord, it might have been within his control—but when made without his consent, we do not think that it must be held to be void.

The only distinction . . . in this case was that the change was made by a tenant who was not the insured after the policy. This is not a material distinction in regard to the reasoning of Mr. Justice. If the policy was made, it was known that the risk was increased.

pany by bringing in a quantity of goods to be sold, creating, it is said, a mercantile risk. Be that as it may, there was no structural change—no waste—nothing in respect of which the landlord could have interfered had he known, and at best the increase of risk is so slight that the finding might well have been the other way.

But granted some increase of risk: the change was made by the tenant for his own purposes, not as agent of the landlord, and not with the assent and not with the knowledge of the landlord. This being so, the cases justify the conclusion that they were made by a stranger (or as if a stranger), one over whom the landlord had no control.

That there was a break in the tenancy is of no importance. The change, if made by any tenant who is in for the time being as owner, is one which is not within the control of the landlord. Had he known of it, whether within his control or not, it might be his duty to notify the company. But no state of facts is proved here to shew that the landlord should do anything more than he did, i.e., remain passive, because unaware that any change was being made in the premises, for which the tenant regularly paid his rent.

The cases upon which the judgment in appeal rests are ones in which the condition was absolute against any change of risk, in which case the insured is liable to lose his insurance if any one makes the change; whether known to or controllable by him or not.

In my opinion, the judgment should be reversed, and the company be ordered to pay the amount insured and costs of action and appeal.

DECEMBER 19TH, 1906.

DIVISIONAL COURT.

KENT v. JOHN BERTRAM SONS CO.

*Negligence—Injury to Workman—Contributory Negligence—
Finding of Jury.*

Appeal by defendants from judgment of MEREDITH. C.J., at the trial, upon the findings of the jury, in favour

of plaintiff for the recovery of \$450 in an action for damages for injuries sustained by plaintiff while engaged in putting in gas fixtures in defendants' factory. Plaintiff was crushed between a column and a crane which was being propelled along a track. Plaintiff alleged negligence on the part of defendants. The jury found the facts in favour of plaintiff, with one exception referred to below.

E. E. A. DuVernet, for defendants.

G. Lynch-Staunton, K.C., for plaintiff.

The judgment of the Court (FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.), was delivered by

FALCONBRIDGE, C.J.:—The finding of the jury that plaintiff could by the exercise of reasonable care have avoided the accident, viz., by the use of a ladder, etc., at first sight seems to interpose a formidable bar in the way of plaintiff's recovery. But, having regard to the evidence, the nature of the case, and the explanation of the jury, it really only defines and describes a degree and kind of negligence in plaintiff, which is very different from the contributory negligence which would disentitle him to recover. It is an example of a case where the plaintiff by his own negligence has brought about a condition of affairs which is unusual or awkward, but which does not exempt the defendant from liability if he could by the exercise of ordinary care have avoided injuring the plaintiff.

The rule was formulated in *Davies v. Mann*, 10 M. & W. 546, and has been recognized in numerous cases and by text writers ever since.

We reserved judgment for the purpose of reading over the evidence given in order to satisfy ourselves whether there was a case to go to the jury. We are all of opinion that there was abundant evidence proper to be submitted to the jury, and upon which they could reasonably find as they have done in plaintiff's favour.

Appeal dismissed with costs.

CHAMBERS.

COPELAND-CHATTERSON CO. v. LYMAN BROTHERS.

*Pleading—Default in Delivery of Defence—Noting Pleadings
Closed—Setting Aside Note and Leave to Defend—Terms
—Costs.*

Motion by defendants to set aside a note entered by plaintiffs that the pleadings were closed, no statement of defence having been delivered, and for leave to defend.

G. H. Kilmer, for defendants.

W. E. Raney, for plaintiffs.

THE MASTER:—The writ of summons issued on 4th April, 1906, and defendants appeared on the 12th. The statement of claim was delivered on 26th June. On 25th April plaintiffs commenced an action against the Business Systems Limited, in which the statement of claim was delivered on 9th May, and statement of defence on 14th June. The solicitors were the same in both actions, and on 29th June plaintiffs' solicitors wrote to defendants' solicitors suggesting that, as the "Business Systems had taken over the defence in this case," against the Lyman Brothers, these two actions ought to be consolidated, and asking if defendants' solicitors would consent to this being done. Defendants' solicitors declined, and plaintiffs' solicitors wrote again, in terms implying that they supposed that both actions would be defended.

No statement of defence was, however, delivered in the Lyman action, and on 12th October plaintiffs noted the pleadings as closed, without giving any notice to defendants' solicitors of their intention to do so. This silence continued until on 17th December instant plaintiffs moved *ex parte* for judgment, and the present motion to set aside the note and allow the defendants to defend was directed by the Judge before whom the motion for judgment came. to be made before me, and was argued on 19th instant.

In view of the facts, as evidenced by the correspondence, there can be no doubt that the motion must be granted. The only question is one of the terms.

to deal with the slip of a solicitor in *Muir v. Gilmare*, 10 O. L. R. at pp. 369, 370, 6 O. W. R. 64; and that when solicitors have been practising on easy terms, such reasonable conduct is not to be discouraged by imposing penalties whenever any little slip or oversight takes place: *Canadian General Electric Co. v. Keystone Construction Co.*, 8 O. W. R. at p. 685.

Here defendants were plainly in default. On the other hand, it would have been more conducive to harmony and the interests of the clients if the default had been brought to the notice of the other side before noting it.

The order will allow defendants to plead, which they must do not later than 29th instant. They will take out this order, and there will be no costs of the motion to either party. I understand it was agreed that the costs of the motion for judgment are to be to plaintiffs in any event, and that this is to be included in the order to be made on the present motion.

MAGEE, J.

DECEMBER 21ST, 1906.

TRIAL.

BISHOP v. BISHOP.

Trusts and Trustees—Land Conveyed to Son of Tenant—Agreement to Purchase—Declaration of Trusteeship—Conflicting Evidence—Improvements by Son—Equitable Decree.

Action by a father against his son for a declaration that the former was the true grantee named in a deed conveying land, and was the owner of the land, and that the defendant had wrongfully asserted title as the grantee, and had wrongfully made a mortgage thereon, and for possession of the land and damages.

MAGEE, J.:—Plaintiff is 80 years old and illiterate. In 1871 he came to Ontario from England, and in 1873 went to live on the land now in question, which then belonged to one Thomas Cundle. It consisted of 5 acres close to the

lived ever since. In 1871 he had 4 daughters and 3 sons, the youngest being the defendant, who was born in 1867, and has the same name as the plaintiff, George Christopher Bishop. The plaintiff asserts that from the first he had an agreement with Cundle for the purchase of the property for \$500. Whether that be so or not, he had not been able to pay anything on the principal, at all events, of the purchase money, up till September, 1890, and any money paid by him had been received by Cundle as rent, at the rate of \$36 per annum or \$3 per month, as shewn by the receipts. It may be that Cundle, who is said to have been a careful man, although agreeing to sell, would only treat plaintiff as tenant, and thus have power of distraining until something was paid on the purchase money. But, although not paying more than the rent, plaintiff had made improvements by addition to the house, fencing, etc. He and Cundle had occasional dealings with each other—buying and trading colts, hay, pasture, etc. On 18th September, 1890, plaintiff paid a sum of money to Cundle, who gave a receipt in full of rent and all accounts to date. On 22nd September, 1890, an agreement under seal was entered into between Thomas Cundle and George C. Bishop, described as a labourer and an unmarried man, for the sale of the property to the latter for \$500, payable by instalments with interest at 6 per cent. yearly.

On the date of and after this agreement the following payments were made: 22nd September, 1890, \$100; 27th October, 1891, \$50; 6th November, 1891, \$54; 2nd August, 1892, \$100; 18th September, 1893, \$12; then 6 payments of \$14.40 each for interest in the autumn of each of the years 1894, 1895, 1896, 1897, 1898, and 1899; and then on 30th September, 1899, \$100, and on 23rd January, 1900, \$142.80.

This was the final payment, and thereafter a deed bearing date 23rd January, 1900, was made by the executor of Thomas Cundle to George C. Bishop, therein described as a mechanic.

In March, 1900, a mortgage of the land was made by defendant, as George C. Bishop, to Mrs. Spry, securing repayment of \$150 lent to him and interest.

This action was brought on 10th October, 1905, plaintiff in his statement of claim alleging that he was the

the owner of the land, and that defendant had wrongfully claimed to be the grantee, and had wrongfully made the mortgage, and praying to have it so declared, and to have defendant ordered to give up possession of the land, and for damages.

Plaintiff's solicitor had previously written to defendant claiming one-half of the land.

At the trial it became manifest that, whatever other rights plaintiff might have, he could not establish that he was the person intended by Mr. Cundle as the grantee in the deed. An amendment of the pleadings was asked for and granted. . . .

The net result of the evidence is that out of the whole \$360 paid for the property over and above the mortgage, defendant has contributed out of his own means only . . . \$50. . . .

We find then that the land on which the family had been living for 17 years, which they understood plaintiff had the right to on payment of \$500, on which improvements had been made, which had increased in value, and which Cundle refused to sell to another over plaintiff's head, for even a larger price, is somehow in September, 1890, put in the name of the youngest of the family, then only 23 years old, who was not a farmer or gardener or labourer, but a plasterer, and who up till that time had not been able to accumulate any money or property, and . . . not appear to have succeeded better for 10 years afterwards. Plaintiff and his family with defendant continued to live there, and matters went on just as before, and on several occasions the son spoke of the property as if it were his father's. There could not have been, in the circumstances, any intention on the part of plaintiff of depriving himself or his wife of their home. If the making of the agreement in the son's name at that time was with plaintiff's knowledge and consent, the situation then and the conduct of the parties as to occupancy and payments afterwards precludes the presumption that the transaction could be taken as an intentional advancement of the son, and as matters stood up till January, 1900, it must, I think, be taken that defendant was really trustee for plaintiff. If the son obtained the agreement without his father's

knowledge, then it would be unconscionable to allow him to hold the benefit of it, obtained and withheld in such circumstances. . . .

After the son's marriage he (about 1903 and 1904) built a house for himself and his wife on the land. Plaintiff says he forbade him to do so, but it is manifest that he and the family assisted to some extent in the building, and helped defendant to move into it. . . .

It would be inequitable that the son should be deprived of that house or the ground immediately occupied with it, not including any worked or used by or for plaintiff since the house was occupied. The house is said to have cost about \$300, the whole property to be now worth \$1,200 to \$1,500.

The evidence has been very contradictory, and on both sides has been in some respects very unsatisfactory.

The judgment will declare defendant to have been a trustee of the whole of the land for plaintiff, but to be now entitled in his own right to the ground occupied or used with the house built by defendant, to be specified by metes and bounds; that defendant should bear, in respect of the ground so occupied with or used with the house, payment of a due share of the purchase money, \$500, paid for the whole property to Mr. Thomas Cundle or his estate, such share to be in proportion to the relative value of such ground before the house was built, as compared with the whole of the property at that time, and to the extent of such share shall pay and discharge the existing mortgage for \$150, and the balance of the mortgage shall be borne by plaintiff, and defendant shall execute to plaintiff (free from any incumbrance done or suffered by defendant) a conveyance of the land, excepting the part to which defendant is declared entitled. No order will be made as to costs up to the present.

The parties will, doubtless, be able to arrive at the measurements, quantities, values, and shares indicated, but, should they not agree, I will hear evidence and settle the amounts of lands and moneys to be inserted in the judgment. I reserve the question of costs involved thereby.

BELL v. GOODISON THRESHER CO.

Sale of Goods—Threshing Outfit—Incapacity of Engine and Boiler Forming Part of Outfit—Contract—Warranty—Reduction in Purchase Money—Reference—Payment into Court—Promissory Notes—Damages.

Action by the purchasers of a threshing outfit for a return of the money paid and promissory notes given and for damages for breach of the agreement of sale.

MAGEE, J.:—It is conceded that the traction 17 horse power engine to be furnished by defendants was to include an engine and boiler, the former being mounted on and affixed to the latter. The whole machinery comprised what is called a threshing outfit, intended to be not only operated but also moved from place to place by the motive power of the engine. It should, therefore, be adapted to run upon ordinary roads, with their unevenness and grades.

It was intended by plaintiffs to be operated by plaintiff Edward Bell with the assistance of his brother Britton Bell, the former generally but not invariably attending to the engine and boiler, and the latter to the threshing machine. Each of them had experience in running portable threshing machines. . . .

By a memorandum indorsed on the agreement, it was not to be binding after 13th March, 1905, if not accepted by defendants in that time. Apparently to conform to that arrangement, defendants on 9th March wrote Edward Bell that they had received the order for the outfit, and that they intended supplying him with the rig, and would get him up a first class one in every respect. The machinery was received by plaintiffs about 18th April, 1905, at Elmvale station. Edward Bell then got steam up and moved it to their farm, and the next day he again worked the engine. . . . On that first trip he says he experienced difficulty in keeping steam up and had to stop several times. . . . He at that time thought there was some merely temporary cause which he would be able to discover with a

further test, and within 3 weeks afterwards plaintiff gave defendants the 6 notes called for by the agreement, \$2,250 in all, of which \$125 would be payable 1st November, 1905. and \$500 1st January, 1906.

Between that and the commencement of the threshing season, Edward Bell used the engine and boiler on 4 or 5 days driving a circular saw. . . . The threshing season began on 9th August, on which day Edward Bell was at work at Dean's farm. Dean was and is local sub-agent for defendants, looking out for orders for them and assisting in obtaining them. It was through his instrumentality that Bell and Loughheed, the agent who took plaintiffs' order, had come together. . . . On that day it was very hard to keep the boiler properly "fixed" so as to maintain the steam at sufficient pressure, and Bell had to use an unusually large quantity of both fuel and water.

I think it is established that from that time forward until the end of the threshing season, late in November, Bell had constantly recurring difficulty with the boiler in its failure to keep up steam, which necessitated frequent stoppages and loss of time, and always it required excessive labour in fixing, and used considerably more fuel and water than should be needed. The Bells say that it would only keep up steam when the wind was in such a direction that they could safely take the screen off the smoke-stack and get sufficient draught. . . .

The first complaint by Bell direct to defendants was by his letter to Mr. Goodison of 11th September, 1905, which accompanied his testimonial of the same date as to the thresher, feeder, and stacker, which, as he explains, constitutes the outfit therein referred to. In his letter of 16th October, 1905, Bell plainly expressed his dissatisfaction and refusal to use the boiler further, and demanded either a boiler that would make steam or his notes.

The defendants' answer of 18th October does not question his cause of complaint, but rather the contrary, and asked him to finish the season's work, and then send them the engine (meaning engine and boiler), and they would make it all satisfactory, and they say they would send him another engine at once if they had one. On 23rd October he replied that he would "try and pull her through," and he had 49 farms to do, but did not see how he could send it back, as he had taken a contract of cutting shingles, and

that they were glad he was having an exceptionally good season and "would be working nearly all winter," and they would look after his note, and they added, "We will make everything right for you."

Bell continued threshing till 20th November, and during the winter used the engine and boiler in cutting shingles or lumber. Mr. Goodison in his evidence says he does not complain of Bell using it till it was returned. . . .

[The learned Judge then set out negotiations and correspondence, payments made, and an agreement between plaintiffs and defendants as to alterations, etc.]

Finally the engine and boiler were shipped at Elmvale on 21st June, 1906, and arrived at Sarnia about 4th July. . . . Defendants had the boiler cleaned and furbished up and provided with a new smoke-stack, and the valve seat planed, and a rocker valve put in place of the former sliding valve, and the piston rings tightened, but neither a new cylinder nor a new boiler was put on, as had been proposed in December. . . . On 31st July defendants shipped the engine and boiler, and wrote that it was now in first class working order. . . . The engine arrived at Elmvale on Friday 10th August. . . . On Saturday 11th August Bell took the outfit to the farm of Robert Ussher and threshed for an hour. During that time they had to stop twice for steam, and had the same trouble as before. . . .

[The learned Judge referred to repeated trials and attempts to improve the machinery, and correspondence between the parties.]

The main question which arises is whether plaintiffs had any and what reason for complaint about the boiler. The evidence satisfies me that they had. Their contention is that the boiler must have been too small, and this is borne out by the evidence of Mr. St. John, who was called as an expert by the defence to shew that the boiler was well constructed. . . . The engine and boiler did not in fact answer the description of a traction 17 horse power engine, and there is nothing to shew that this was a sale of a known specific article the capabilities of which the purchaser took the risk of.

well be argued, however, that the combined machine could not be said to be well made if one part was not adapted for or so constructed as to reduce the power of the other. But under *Frye v. Milligan*, 10 O. R. 509, and *Tomlinson v. Morris*, 12 O. R. 311, damages cannot be recovered under the warranty, as the property has not passed.

Defendants have not availed themselves of the option of supplying other machines, but refuse to do so. The alternative is not stated in the contract, unless it is the subsequent provision as to refund of notes or money already referred to.

Under the clause as to defects or failures in one part, plaintiffs are, I think, deprived of any right to condemn or return any part of the outfit other than the engine and boiler. Not having the right to return all, they cannot claim a failure of consideration to entitle them to a return of the whole moneys paid and notes outstanding.

As the engine and boiler did not answer the description of the machines purchased, plaintiffs are, I think, entitled to that extent to have a return or reduction of the purchase money. In *Nichol v. Goatz*, 10 Ex. 191, although there was a warranty, and the contract said that was the only warranty, the vendor failed to recover, as the oil did not answer the description. In *Josling v. Kingsford*, 13 C. B. N. S. 447, though the sale was expressly without warranty, the purchaser recovered his money on the like ground. There is an indication in the letters that at least one of the notes was negotiated by defendants.

The evidence does not enable me to say what reduction should be made in the original purchase money on account of the engine and boiler. Unless the parties can agree, it will be referred to the Master at Barrie to fix the sum. Whatever the amount may be, plaintiffs will be entitled to recover it from defendants with costs, except of the reference, but defendants shall be at liberty to pay the amount into Court and have liberty to apply for repayment thereof to them upon proof that they, or other the lawful holders of the four promissory notes for \$500 each, have given credit thereon by indorsement, or in such other way as the Court shall approve. for the amount as fixed or agreed upon. as a

reduction of principal, at and from the dates of the notes, such reduction to be proportioned upon each note, and if the proportionate reduction on the note due 1st January, 1906, would exceed the balance owing thereon, the excess shall be added in equal proportions to the reduction of the other three notes. Instead of paying into Court or to plaintiffs, defendants may apply to dispense with such payment, upon the like proof. In case of payment into Court, plaintiffs, or either of them, upon proof of payment by them of any of the four notes, shall have liberty to apply for payment out of Court of the amount for which credit should be given. Costs of the reference to be payable by whom and to the extent the Master shall direct. The engine and boiler to be at the disposal of defendants.

I do not find that plaintiffs have sustained any damages by loss of time or customers or otherwise in the conduct of their business beyond the benefit they have derived from the use of the engine and boiler.

DECEMBER 21ST, 1906

DIVISIONAL COURT.

ADAMS v. FAIRWEATHER.

Way—Private Right of Way—Easement—Prescription—Presumption of Lost Grant — Evidence — Interruption—Inconsistent User by Others—Jus Publicum.

Appeal by plaintiff from judgment of MULLOCK, C.J., : O. W. R. 785, dismissing action for a declaration that plaintiff was entitled by prescription to a right of way appurtenant to his premises, being lot 119 on the east side of Bleecker street, in the city of Toronto, over a strip of land, part of the rear end of defendant's property, known as street numbers 610, 612, and 614, on the west side of Ontario street.

H. E. Rose, for plaintiff.

W. H. Blake, K.C., for defendant.

MAGEE, J.:—The strip in question, which is alleged to be the servient tenement, adjoins the east side of the lane called Darling avenue, plaintiff's land in respect of which he claims the right of way being on the opposite side of the lane. The lane was a public thoroughfare, and plaintiff says that he "always considered the strip was part of the lane, and never thought it was anything else," and he "always" (that is throughout the 20 years) "thought he had a right," and all his witnesses likewise considered it part of the lane, and said that the public used it as such, and he says the "general traffic would be nearly all on that piece." The evidence for plaintiff, if it established any way at all, established it as a public way.

In *Earl de la Warr v. Miles*, 17 Ch. D. 53, James, L.J., says at p. 585: "For instance, if the owner of a particular house in London shews that he and all the people who have lived in that house have for a long period gone every year to Hampstead Heath and run about the Heath, he cannot thereby establish a particular right as annexed to that house to go upon Hampstead Heath, when it is quite clear that he only went there like every other person who went from London to recreate himself there." . . .

In *Gale on Easements*, 7th ed. (1889), p. 164, it is said: "Prescription may be defined to be a title acquired by possession had during the time and in the manner fixed by law. . . . To constitute a legal possession there must be not only a corporal detention or that quasi detention which according to the nature of the right is equivalent to it, but there must also be the intention to act as owner. Thus no legal possession is acquired by a man walking across the land of his friend or using a private way thinking it to be a public one, or unless he would do the act in defiance of opposition."

Here plaintiff, on his own shewing, was not exercising an easement in respect of his land, but only a supposed right as one of the public, a claim which defendant was not called upon to meet.

Appeal dismissed with costs.

COPELAND-CHATTERSON CO. v. BUSINESS SYSTEMS LIMITED.

Conspiracy—Trade Competition—Procuring Incorporation of Company to Compete with Plaintiffs—Inducing Plaintiffs' Servants to Leave Employment—Using Information Obtained in Plaintiffs' Employment—Appropriation of Plaintiffs' Documents and Chattels — Master and Servant — Breach of Confidence—Injunction—Damages.

Action for damages and an injunction and other relief in respect of a conspiracy by the defendants Henry J. King and others to procure the incorporation of the defendant company to engage in business in competition with plaintiffs.

W. E. Raney and A. Mills, for plaintiffs.

S. H. Blake, K.C., and W. H. Irving, for defendants.

CLUTE, J.:—Plaintiffs are manufacturers of what is known as "the loose leaf business systems of book and account keeping," and have been engaged in that business in Canada since 1896, and are the owners of letters patent protecting the rights of invention in the system. The personal defendants were in plaintiffs' employment until about the middle of June, 1905; the defendant King as sales manager under contract in writing expiring on 31st January, 1906, at a salary of \$1,800 per year. It was a term of his contract that he should "devote his entire time and energy to the company in the capacity of director of promotion and publicity." Defendant Baird was superintendent of plaintiffs' machine shop at a salary of \$1,500 a year, and it was a term of his contract that he should devote his entire time and energy to the interests of plaintiffs. Defendants Harcourt, Trout, and Archibald were salesmen for the city of Toronto under contracts in writing; Harcourt at a salary of \$2,000 a year ending on 31st January, 1907; Trout for a like term and at the same salary; Archibald for a term ending on 31st August, 1906, at a salary of \$1,500 a year. It was also a term of each of their contracts that they should re-

tins, and that they should not engage their services or be interested directly or indirectly with any other company, firm, or person, carrying on a similar business to that of the plaintiffs, and in the event of their so doing it was a provision of the contracts that the same might be immediately terminated at the option of plaintiffs. Defendant Hoose was assistant foreman of the machine shop.

The defendant company was incorporated under the laws of the Dominion of Canada; the defendants other than Hoose are members and directors of the same, Trout being vice-president, King managing director, and Archibald secretary-treasurer.

Plaintiffs and their predecessors in title first introduced the loose leaf system of book and account keeping in Canada, and have spent large sums in perfecting and protecting the same and for special machinery and tools to turn out the same, and in procuring customers for their product, the result of which has been to build up a large business connection throughout Canada.

Defendant King, as head of his department, became intimately acquainted with plaintiffs' business, the cost of manufacture, list of customers, and the profits of the business. Defendants King, Trout, Harcourt, and Archibald also had knowledge of plaintiffs' list of customers in Toronto; all of which knowledge was of a confidential character, and not to be communicated to third parties or used against plaintiffs' interests. The machinery and appliances used by plaintiffs in turning out their product are of a special character, devised and made for the purpose. Defendants Baird and Hoose had full knowledge of this and of the special tools to make the same, and they perfectly well understood this knowledge to be of a private and confidential nature.

Defendants King, Baird, Harcourt, Trout, and Archibald, during the early part of 1905, and while in the employment of plaintiffs, decided to form a new company and carry on a business similar to that of plaintiffs, and the time and manner and object of their doing so gave rise to this action.

It is charged that during February, March, April, and May, and the early part of June, 1905, the defendants, other

conspiracy to procure the incorporation of a company to engage in business in competition with plaintiffs; to induce plaintiffs' servants to break their contracts of employment and to go to defendants; to communicate private and confidential information with reference to plaintiffs' business, the knowledge of which was obtained while in plaintiffs' employment; to print and publish false and malicious statements in relation to plaintiffs' business; to abstract from the business office and to appropriate to the use of defendants certain records, and to abstract from plaintiffs' machine shop and to appropriate to the use of defendants all plaintiffs' fine tools which had theretofore been and were being used in the manufacture of machines and appliances for use in the manufacture of plaintiffs' products, and to use the tools to duplicate plaintiffs' machines and appliances; to make use of private and confidential information acquired by defendants Baird and Hoose while in plaintiffs' employment to duplicate plaintiffs' special machinery; to make use of private and confidential information acquired by defendants King, Harcourt, Trout, and Archibald, while in the employment of plaintiffs, to make for the use of defendants a list of plaintiffs' customers in Toronto, without compensation and to the great injury of plaintiffs; and to deprive plaintiffs of and to give to defendants the business which plaintiffs and their predecessors in title had built up. . . .

The matter was frequently talked over among the defendants, other than Hoose, who in the earlier stages does not appear to have been taken into their confidence. Matters progressed so far that it was decided to place the matter of the formation of the company in the hands of one Wovenden, of Montreal. Meetings were held for 2 or 3 months before 15th June. Wovenden came to Toronto; the prospectus was discussed with him, and he received from defendants, other than Hoose, the data from which it was compiled. I find that this prospectus was printed as early as 6th May, and, while it was not made public, it was shewn to various persons with the object of procuring subscriptions for stock in the proposed company. It is marked private and confidential, and is headed "Prospectus," and is in part as follows:—

loose leaf accounting systems.

“ Business Arrangements. For the purpose of carrying on such a business, arrangements have been completed to secure the services of 7 men, all experienced in the line of goods and covering every department, both selling and manufacturing, they all having had many years' experience in the largest loose leaf house in Canada. These men embrace the following: general sales manager, mechanical superintendent, and 5 travelling accountants. . . .

“ The amount of business done by the selling force interested during the past year for the company they are now connected with was \$140,000.”

I find from the evidence that the general sales manager referred to is defendant King; the mechanical superintendent is Baird; and the 5 travelling accountants are defendants Harcourt, Trout, Archibald, one Randall, then and now plaintiffs' manager at the city of Winnipeg, and Stanfield, plaintiffs' manager then and now at Hamilton.

At the time the circular was prepared it was expected that both Randall and Stanfield would join defendants. Randall had been down to Toronto, and had talked over the matter with King, Trout, Archibald, and Harcourt, but had come to no decision. On 29th May King writes to Randall. He begins by calling Randall's attention to the fact that his draft for \$100 had been refused by plaintiffs. He endeavours to prejudice Randall against plaintiffs, and refers to Randall's correspondence as “ clear enough evidence of how you feel.” He refers to the general manager Myers as the “ plague.” He refers to the absence of Mr. Copeland in England. He then proceeds:—

“ You are in touch with our first moves. Now, our operations have culminated in something, and it looks as if Business Systems Limited was a certainty—and this is of momentous interest to you. Our capital is assured, and we have already some \$40,000 in Toronto, of which 7 of us have taken \$15,000. Two weeks ago we employed a capitalist named Wovenden in Montreal to secure the balance of the capital. He has secured such men as Senator Robert McKay (who will be our president), and men of like

"Now, we are assured of capital amounting in cold dollars to \$115,000, of which we are calling in about \$58,000 or 50 per cent.—plenty of money you will admit.

"We mean business, and can place on the market in about 3 months all our stuff but ledger, and it will take may be 3 more to be ready in that line—but we have a winner I can tell you.

"Now, Arthur, we have a good selling force, but we want better, and we want A. G. R. to join the bunch. Now, Arthur, suppose you don't make quite as much the first year—we can give you a good contract, and, if you come in now, a nice block of stock, and you will be working for yourself.

"We have \$15,000 in 2nd and common and will give you the same share of this as all the rest are getting, \$2,000. In addition, we want you to take the same amount of stock for cash—the total call on this being \$800 in 9 months.

"Our statement—figuring upon a basis of \$15,000 profit in any year—would be along the following lines. \$15,000 is not high when one considers C. C. (plaintiffs) make \$50,000 and pay enormous salaries and expenses."

The letter goes on to shew probable profits, and continues:—

"Now, your share of profits would be \$1,650, augmenting your salary to \$4,650, figuring you made no commission. If you keep Bainey (another employee of plaintiffs), your chances are for as much money as you can possibly make now.

"We have to cover your territory—it's a good one—and we want you to cover it for us. It would be hard to be working against you, old chap. You must see that we can give the C. C. C. (the plaintiffs) a run for life. Now here is a bully good proposition for you. You fall in line, so will Davidson (plaintiffs' manager at Vancouver), though no mention has been made to him. C. C. Co. is a one-man, Jew-managed outfit from now on. He has the thing cooked, and we are going to try and cook him. I don't mean that we are going to lay low for C. C. Co., but Myers (plaintiffs' manager) must feel the results of our efforts.

"Now, Arthur, don't mention this, as the firm don't know yet. We are not prepared to resign for a couple of weeks, but join us. We can all make money together."

Randall replied on 7th June declining to join defendants. Randall was at this time in the employment of defendants at \$150 a month. . . .

King was dismissed on 14th June. Wovenden came up from Montreal on the 15th, and a meeting was held the same evening. At this time Harcourt and Baird had also been dismissed. Trout and Archibald were not dismissed until the next day. On the evening of the 15th an agreement was entered into between Wovenden, of the one part, and defendants King, Baird, Harcourt, Trout, Archibald, and Standfield, of the other part. The parties agree to form a company within a period of 4 months, and the parties of the second part bind themselves to enter the employment of the company for a period of 5 years at a salary of not less than \$2,000 per annum and commission on sales. It is further provided that King is to be manager, Baird, mechanical superintendent, Harcourt, Trout, Archibald, Standfield, and Randall, travelling accountants. They are to devote all their time and energy to the new company. Should the company be incorporated and start business within a period of 4 months, and should any of the parties of the second part fail to carry out their engagement made and make default, they are liable to pay a penalty of \$1,000 as damages for such default.

After the meeting at which the above agreement was signed, Baird and King, the same night, went to the house of defendant Hoose, got him out of bed, and then and there engaged him at a salary greater than he received from plaintiffs, the salary to commence at 12 o'clock that night. But for the solicitations of hiring, I find that Hoose would have returned to work for plaintiffs the next day. Hoose carried away from plaintiffs' factory a large number of tools belonging to plaintiffs, many of them specifically made for the making of certain machines of plaintiffs, then and now required in plaintiffs' factory. . . .

Defendants obtained incorporation, and for their company's name, under which they are now carrying on business, they appropriated the words "Business Systems," which plaintiffs had used from the inception of their busi-

To understand the conduct and object of defendants in this case, it is necessary to refer to the nature of plaintiffs' business. Plaintiffs and their predecessors in title in the United States were the first to introduce what is called "Business Systems" of book-keeping and accounts. This system includes ledger binders and holders of accounts made in such form that leaves may be from time to time supplied and put in the old binders and holders. The form is such as to afford convenience to those using them to a greater extent, it is said, than the ordinary ledger, as well as being a great saving in expense. Whatever the reason, the demand for the "Business Systems" has greatly increased, and plaintiffs have established a very large and lucrative business in this line.

The personal defendants—other than Hoose—while in the employment of plaintiffs formed a scheme and by mutual inducements and combination united in the attempt illegally to appropriate a large part of this business which plaintiffs had built up; and with that end in view defendant King, the general manager of defendant company, was the chief mover, though all the defendants—other than Hoose—were very active in the enterprise. These defendants held many meetings, discussed the matter frequently, obtained private and confidential information relative to plaintiffs' business, utilized this in preparing the prospectus of the proposed company, endeavoured to induce the servants of plaintiffs to leave their employ, carried away with them confidential information, and induced other servants of plaintiffs to leave and to carry away with them when they left further papers containing information acquired while they were in the confidence of plaintiffs.

The defendant company, after incorporation, through their general manager and other officers, continued to induce others of plaintiffs' employees to leave plaintiffs and to join the defendant company, and all of the defendants appropriated the records, pattern sheets, tabs, special tools, and private information, and therefrom duplicated plaintiffs' product, and by the information obtained while in the employment of defendants ascertained plaintiffs' customers, and in this way appropriated to a large extent plaintiffs' business.

There was some evidence offered that, while the records, pattern sheets, and special tools, were necessary and useful to plaintiffs in their business, and were helpful to defendants, yet that defendants did not use them to any appreciable extent. I do not believe defendants when they so state. The evidence satisfies me beyond doubt that this confidential information, which was admitted to be beneficial to defendants, and which was admitted to have been used by defendants to a limited extent, was wholly appropriated by them, to the extent of their wants, for the purpose of carrying out their scheme to appropriate plaintiffs' business, and I find as a fact that the defendant company was incorporated for that express purpose, is managed by the personal defendants, and has, as far as a company may without formal by-law or resolution, adopted and taken the benefit of the wrongful acts of the other defendants.

Hoose, who does not appear to have taken any active part in the earlier stages of the conspiracy, left plaintiffs' employment at the solicitation of defendants, and assisted them in their undertaking by carrying away the tools of plaintiffs and using them in furtherance of defendants' business, and I infer from the evidence, and find as a fact, that he had knowledge of the wrongful actions and intentions of defendants, and joined them with a view of assisting them in carrying out their scheme under the inducement of higher wages and in breach of faith with plaintiffs, his former employers.

It is a necessary implication of a contract of service that the servant shall serve his master with good faith and fidelity. . . .

[Reference to *Robb v. Green*, [1895] 2 Q. B. 315; *Lamb v. Evans*, [1893] 1 Ch. 218, 226; *Morrison v. Moat*, 9 Hare 241, 255, 258; *Albert v. Strange*, 1 Macn. & G. 25; *Louis v. Smellie*, 73 L. T. N. S. 226; *Liverpool Victoria Legal Friendly Society v. Houston*, 3 Court of Sess. Cas., 5th series, 42; *Merryweather v. Moore*, [1892] 2 Ch. 518; *Stone v. Goss*, 65 N. J. Eq. 756; *Brown v. Hay*, 25 Rettie 1112; *High on Injunctions*, 4th ed., sec. 19.]

On this branch of the case I am of opinion that plaintiffs are entitled to an injunction and to a reference to ascertain the damages.

plaintiffs' servants to leave their employment. The mutual solicitation and encouragement among the personal defendants other than Hoose was none the less enticing because they did not require much persuasion. I find as a fact that the personal defendants other than Hoose conspired together while still in plaintiffs' employ to leave, and they endeavoured both before and after they quitted plaintiffs' service to induce other employees to leave, and on their inducement many did leave, and some of those who remained were induced to do so only by higher wages. . . .

[Reference to *Regina v. Warburton*, L. R. 1 C. C. R. 276; *Quinn v. Leathem*, [1901] A. C. at pp. 510, 529, 530.]

In *O'Keefe v. Walsh*, [1903] 2 I. R. 681, it was held that the fact that separate defendants joined the conspiracy at different times is no ground for objection that the action is wrongfully constituted in law, there being in substance only one cause of action, the conspiracy to injure; the damage may be assessed separately, having regard to the date of joining the conspiracy, but acts done in furtherance of the conspiracy prior to the joining may be given in evidence for the purpose of shewing the origin, nature, and object of the conspiracy: and see *Owen v. Dwyer*, 24 Ir. L. T. R. 111.

I do not find that this precise question of damages has been elsewhere decided, and but for this decision, to which, no doubt, great weight is to be attached, I should have thought that each was liable for all the damages which resulted from the conspiracy, whether the damage accrued before or after he joined it. . . .

The parent conspiracy in the present case was to pirate plaintiffs' business by illegal means. The evidence, I think, is conclusive that all the illegal acts afterwards resorted to were from an early date contemplated by the conspirators. Some of these means were to induce plaintiffs' servants to break their contracts and go with defendants, and to carry with them duplicate orders from customers, the record of sizes, tools, tabs, forms, and patterns, whereby to reproduce plaintiffs' product and reach plaintiffs' customers. . . .

In the very able argument of Mr. Blake it was urged with much force that, as the contract did not in terms pre-

tion they could get while in plaintiffs' employment, they had a right to carry away with them this information and to use it in any new business in which they might engage, and that they had a right to make preparations for the proposed business, so that as they stepped out of the one employment they might engage in the other. There is a sense in which this may be true, but I think that there is a clear line beyond which an employee may not pass without rendering himself liable in damages, and that line from the foregoing cases I take to be that he must not break confidence and employ that breach of confidence to the damage of his late employer. The distinction is clearly pointed out by Kekewich, J., in *Merryweather v. Moore*, [1892] 2 Ch. at p. 524, although the view there taken, that he may make use of what he is able to carry in his head as an act of memory is not fully supported by the cases. The weight of authority seems to be rather against that view, if what was acquired was a matter of confidence peculiar to the business in which he was employed. . . .

[The Judge then quoted from and distinguished *Mogul Steamship Co. v. McGregor*, 23 Q. B. D. 598, [1892] A. C. 25; *Allen v. Flood*, [1898] A. C. 1, 106, 138, 140, 172; *Nichol v. Martin*, 2 Esp. 733; and referred to and quoted from *Robb v. Green*, [1898] 2 Q. B. 315.]

I further find that the incorporation of defendant company under the name which plaintiffs had always used in their business, namely, "Business Systems," was itself one of the acts done for the purpose of carrying out the conspiracy to fraudulently obtain plaintiffs' business. I cannot think that, had the Crown been advised of the facts of this case, in so far as it relates to the name "Business Systems," it would have permitted defendant company to incorporate under that name, to the manifest injury of plaintiffs. . . .

The injunction should be made perpetual and relief granted in terms of paragraphs 1, 3, 4, 9, 10a, 10b, 10c, and 10d, of the prayer of the statement of claim. There will be a reference to the Master in Ordinary to take the account of profits, or assess the damages, or both, as plaintiffs may elect, on the different claims. Costs of this action, inclusive of the entry of judgment to plaintiffs; further directions and subsequent costs reserved.

BRITTON, J.

DECEMBER 22ND, 1906.

TRIAL.

CHICAGO LIFE INSURANCE CO. v. DUNCOMBE.

Principal and Surety—Bond for Fidelity of Agent of Insurance Company—Advances to Agent and Premiums not Paid over—Construction of Bond—Application to Existing Agreement between Agent and Company—Withholding from Surety Information as to Material Facts—Release.

Action against R. L. Duncombe and T. H. Duncombe upon their bond to plaintiffs. T. H. Duncombe was surety for R. L. Duncombe, who had been and was at the time of the execution of the bond, and was styled therein, the plaintiffs' "agent for the purpose of soliciting for applications to said company for assurance upon the lives of individuals, and of performing such other duties in connection therewith as may be required by the officers of said company."

C. St. Clair Leitch, Dutton, and J. R. Green, St. Thomas. for plaintiffs.

J. M. Glenn, K.C., for defendants.

BRITTON, J.:— . . . Herbert S. Duncombe, a relative of defendants, is a director, the 3rd vice-president, and general counsel of the plaintiffs, who were incorporated only in 1902. Tierman & Stout were general agents of this company, and at first the defendant R. L. Duncombe worked under these general agents. On 11th September, 1905, R. L. Duncombe was appointed agent of plaintiffs, and a formal agreement was entered into between the parties. On 8th November, 1905, a new agreement was made, and on 29th January, 1906, there was yet another new agreement, each later agreement cancelling and superseding the former as between R. L. Duncombe and plaintiffs. On 7th May, 1906, the special agreement of 29th January, 1906, was modified, and was continued in force only subject to the supplementary agreement of 7th May.

R. L. Duncombe bought and paid for some stock in plaintiff company, which was taken in the name of H. S. Dun-

combe, who was surety to plaintiffs for R. L. Duncombe on a bond similar, as he says, to the one that defendant T. H. Duncombe is now on, except that H. S. Duncombe is of the opinion that his bond as surety was for only \$1,000.

It was the practice of plaintiffs to make advances to agents, these to be repaid by the agent's commission, and plaintiffs did apparently from first to last advance to R. L. Duncombe between 8th November, 1905, and 7th May, 1906, sums aggregating \$900, and it is said that R. L. Duncombe collected premiums for which he did not account in March, April, and May, 1906, amounting to \$75.72. A further amount of \$60 is charged as an advance to R. L. Duncombe. . . . I am of opinion that the evidence fails to establish that item as against the surety.

All the advances by plaintiffs to R. L. Duncombe, except \$75 advanced on 7th May, 1906, were made before the date of the bond sued on, and the \$75 was advanced on the same day the bond was made. The premiums received and not accounted for were all received on or before date of bond, except one small sum of \$8.47, which is charged as of 11th May, 1906. The proof of these premium items is not the most satisfactory as against the surety. Very likely they were received by R. L. Duncombe. This action is brought upon the assumption that defendant T. H. Duncombe by his bond became liable and is now liable for the entire debt of R. L. Duncombe to plaintiffs, existing at date of bond, as well as for any indebtedness which would thereafter arise from R. L. Duncombe as agent of plaintiffs to them.

Two questions arise: (1) upon the construction of the bond; and (2) was there such concealment by plaintiffs, or that may be imputed to them, of material facts as to invalidate the bond given by the surety—can plaintiffs recover against the surety upon the bond obtained under the circumstances disclosed by the evidence?

As to the first, I am of opinion that, upon the fair and proper construction of this bond, the defendant T. H. Duncombe, if liable at all, is liable only for advances and default after the making of the contract between plaintiffs and R. L. Duncombe of 29th January, 1906. It was contended and is arguable that under this bond the limit of the surety's liability would be for advances made and money collected after

the execution of it. Cases go a long way towards establishing this contention. . . .

[Reference to *Canada West Farmers' Mutual and Stock Ins. Co. v. Merritt*, 20 U. C. R. 444.]

One rule of construction is that words are to be given their natural meaning.

In *Allnutt v. Ashenden*, 5 M. & G. 392, the words, "I hereby guarantee Mr. John Jennings's account with you for wine and spirits to the amount of £100," were held to relate only to existing account, although that account did not amount to £100.

A guarantee may be so worded as to cover past debts, even where a consideration to guarantee such would appear to be wanting, but the language must be clear. Many of such cases to which I was referred were banking cases, where an account existed and was to be continued. There, as might be expected, a guarantee to permit continuation was intended to cover and was held to cover past indebtedness.

I think, in terms, the bond must be held to cover past indebtedness of R. L. Duncombe, so far as that indebtedness was incurred as an agent of plaintiffs under the then existing contract or agreement of agency. The condition is that R. L. Duncombe shall pay over "all money which he now owes or hereafter may owe said company . . . on account of losses or advances made to the said R. L. Duncombe during the continuance of the present agency of the said R. L. Duncombe . . . for the purpose of enlarging the business or otherwise, and whether the same shall have been advanced under the terms of the agency agreement between the said R. L. Duncombe and said company, or any future agreement, or otherwise . . ."

The present agreement of 29th January, 1906—the only agreement as to agency of R. L. Duncombe in force—makes no provision whatever for making loans or advances to R. L. Duncombe. The advances made on and after 29th January, 1906, were probably made because of the existence of the relations between plaintiffs and R. L. Duncombe, but were not made under any terms or stipulations mentioned in that agreement. There is no evidence that the loans or advances were made for the purpose of enlarging the business of R. L. Duncombe, or for such purpose as can be included in the term "or otherwise," applying the *ejusdem generis* rule of con-

struction. Giving the bond the most liberal construction in favour of plaintiffs, I think the past indebtedness must be limited to that created during the then current agreement between plaintiffs and R. L. Duncombe, and that no advance to him, even if made under some former agreement for agency, is covered, any more than a private debt to plaintiffs owed by R. L. Duncombe as an individual and not as an agent can be recovered by plaintiffs from defendant T. H. Duncombe. The agreement of 29th January, 1906, cancels all previous agreements between plaintiffs and R. L. Duncombe for agency. The only part of the past indebtedness of R. L. Duncombe to plaintiffs for which defendant T. H. Duncombe is liable, if liable at all, is what R. L. Duncombe owed as agent under the only agreement of agency in force on date of execution of bond. . . .

Upon the second branch of the case. It may be conceded that the contract of suretyship is not one of those spoken of as being *uberrimæ fidei*, but the creditor or employer owes a duty to the intending surety.

In *Davis v. London and P. M. Ins. Co.*, 8 Ch. D. 469, it was held that the change of circumstances between the company and their agent ought to have been stated to intending sureties. . . .

[Reference to *Hamilton v. Watson*, 12 Cl. & F. 108.]

In this case there was the evidence of an existing bond, with plaintiffs' third vice-president and general counsel as surety, which bond was to be given up upon getting a new one with defendant as surety. R. L. Duncombe was to get pay for stock owned by him, but standing in the name of this same officer of plaintiff company, but no attempt was made to keep out of the proceeds of stock R. L. Duncombe's indebtedness to plaintiffs, but the whole, by manifest intention, was to be thrown upon defendant, who was in entire ignorance of the real state of affairs between R. L. Duncombe and plaintiffs. . . .

[Reference to *Lee v. Jones*, 17 C. B. N. S. 482; *Railton v. Matthews*, 10 Cl. & F. 934; *North British Ins. Co. v. Lloyd*, 10 Ex. 523.]

I think what the surety would naturally expect was that the contract between the principal debtor and the plaintiffs was that of agency upon a new appointment; that the agent was to give security for work and faithful discharge of duty

and conveyed to defendant, or for a declaration that she held the land in trust for him, etc.

H. H. Strathy, K.C.; for defendant.

M. B. Tudhope, Orillia, for plaintiff.

The judgment of the Court (FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.), was delivered by

RIDDELL, J.:— . . . Plaintiff is a retired farmer of some 80 years of age, with a grown-up family of sons, whom, as he says, he has "helped too much," or rather "they helped themselves," though he "never gave them a great deal of money." Some 4 or 5 years ago he came to the conclusion that he should marry and have a home of his own, as apparently his sons had left him, because "a home of your own is worth two of other folks'." He had been a pretty careful man, had done all his own business, bought and sold cattle and horses, conducted his farming operations, sold his grain, paid his rent, banked his money, all without assistance, and I can find nothing to indicate that he was a man of less than ordinary intelligence and strength of mind and character.

He married the defendant—a widow—herself with a family, and they seem to have lived on harmonious terms. There is no evidence of any fiduciary relations existing between the two, and no charge is made that plaintiff relied upon defendant for advice in respect of any business transaction, and no suggestion that he was not perfectly competent to understand and transact ordinary business.

No fiduciary relationship will, of course, be presumed.

Thomas Langstaff, the son of defendant, says that shortly before the transaction in question plaintiff and he were at a creamery, and "after we left the creamery Mr. Jarvis told me . . . one of his sons . . . was trying to rogue him; Robert his name was. He says, 'They have been trying to do me up,' and he says, 'As soon as this fall I get things settled I am going to quit farming; I am going to Markham; there is a house there I can get; I am going to buy it, and I will give it to your mother, and they won't have a chance to get that.'" . . . (Plaintiff denied this.)

About the same time he has a conversation with George Langstaff, another son of defendant, and Langstaff's account

is as follows: ". . . Him and I was talking about Orillia, and he said he had a notion of going up to Orillia, and he said, 'If it suits me I am going to buy a place there, and I am going to buy it for your mother.' . . ."

There is no contradiction by plaintiff of this, and though, upon being recalled, he is asked whether he has heard the evidence of his wife's sons, he is asked nothing as to this conversation.

The trial Judge has found that he did so speak to these two witnesses.

The next proceeding is that plaintiff sees one Clark, a land agent at Orillia, about buying a house, and Clark says: "It was Mrs. Jarvis he seemed to want to suit." "He said Mrs. Jarvis was to be suited." And finally a house owned by one Sanderson is picked upon as suitable. Perhaps there is no great significance to be attached to the fact that when a man is buying a house it is his wife "he seems to want to suit," and it is perhaps not at all unusual that a man intending to buy a house to be owned by himself does tell the agent that it is his wife who is "to be suited." But what follows is, I think, quite different in its effect.

The deal is closed by Clark and plaintiff, \$50 is paid by plaintiff to Clark, and a receipt given by Clark; and the following occurred, according to Clark:—"When they were paying the \$50, or before they paid the \$50, Mrs. Jarvis spoke and said this house was to be hers, and he said, 'Yes, the house is to be Mrs. Jarvis's,' and he gave me to understand it was to protect her as much as anything against his children, that his children and him had not been getting on very well, and it was to protect her in case of his death that she would have the property." This is not denied by plaintiff, the trial Judge has not found against it, and it must be taken as established.

An arrangement is then made between Clark and plaintiff that Clark is to bring Sanderson down to the house of Thomas Langstaff that evening and close out the sale. A meeting is accordingly had, at which are present Clark, Sanderson, Thomas and George Langstaff, the plaintiff, and the defendant. The defendant was not called at the trial, her counsel saying (after the evidence of Clark, Sanderson, Thomas and George Langstaff, had been given): "The only other witness I have is Mrs. Jarvis, and I just mention it so that my

learned friend will know, if he wishes to call her, she is here, but she would only corroborate what has already been said, and I do not think there is any object in multiplying evidence."

All these witnesses agree that in answer to an inquiry by Sanderson as to whom the deed was to be made to, plaintiffs said that it was to be made to his wife. The language of the different witnesses, as might be expected, is not identical, but the substance is the same.

Plaintiff says that he did not give any person any instructions to put his wife's name in the deed, that he did not intend the property to go to his wife, "to rob me and my family," but in cross-examination he changes this; and, the occasion being brought to his mind, we find this:—

Q. Were you asked by Mr. Sanderson to whom the deed was to be made down there? A. I don't mind whether I was asked or not, but if I was, of course I expected my name was on the deed. Q. That is not what I am asking you. A. Well, follow me up. Q. Do you remember being asked whose name was to go in the deed? A. I tell you I don't remember whether I was asked about that or not. Q. Then you would not deny that you were asked? You may have been asked? A. Well, I don't think, to tell God's truth, that I was asked; I couldn't say, to tell the truth and swear it here. Q. You would not swear that you were not asked? A. No, I won't say nothing because I can't bring it in mind.

After the defence was closed, plaintiff was recalled, and the following took place:—

Q. You heard Mr. Sanderson swear that you told him to put the deed in your wife's name? A. I did, I heard him swear that.

Q. (by counsel for plaintiff)—Did you ever give him any such instructions? A. Not to the best of my knowledge, I didn't.

As the trial Judge has found, he was then at variance with 3 of his sons, and the evidence convinces me that he desired and intended when buying this house to buy it for his wife, that it should be his wife's, and that his family should not have any interest in it—and that his wife should not be driven to her "thirds."

intimation throughout the conversation that in providing a home for his wife he did not intend to provide a home for himself also—that he intended after the death of his wife and himself that the property should be subject to her disposition, that its destination should be controlled by her rather than himself. I should have been much astonished had it appeared that any such intimation was given; but if the trial Judge intended to find that plaintiff did not understand the effect of what was being done, I most respectfully dissent from that view. He was a man capable “in a dispute of taking his own part,” “yet hale and vigorous for a man of his years;” and there is nothing to indicate that he was a man of inferior powers of mind.

There was no pretence that any undue influence had been used; none can be presumed in such a case as this: *McConnell v. McConnell*, 15 Gr. 20; even if, as was not the case here, there was the existence of confidence: *Wallis v. Andrews*, 16 Gr. 637; *McEwan v. Milne*, 5 O. R. 100; and compare *Irwin v. Young*, 28 Gr. 511; *Lavin v. Lavin*, 7 A. R. 197.

There is no rule requiring a defendant such as this, in no position of confidence, to prove the absence of undue influence, nor that the grantor had independent advice. . . .

[Reference to *Luton v. Sanders*, 14 Gr. 537, 538; *Armstrong v. Armstrong*, 14 Gr. 528, 536; *Corrigan v. Corrigan*, 15 Gr. 341, 343. *McCaffrey v. McCaffrey*, 18 A. R. 599, and *Hopkins v. Hopkins*, 27 A. R. 658, distinguished.]

I do not consider that it is necessarily, in the circumstances of this case, an improvident transaction for a farmer worth \$2,400 or so, to expend \$1,150 in buying a house for his wife and to give it to her.

If there were any doubt about the intent of plaintiff, his full understanding of the transaction, and his capacity, I think what followed the making of the deed would resolve that doubt in favour of defendant. I do not go into these matters, as, in the view I take, it is not necessary to consider them.

I think the appeal should be allowed and the action dismissed. Substantial justice will be done, however, by directing that no costs be given here or below.

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NO. 23

CARTWRIGHT, MASTER.

DECEMBER 24TH, 1906.

CHAMBERS.

BANK OF NOVA SCOTIA v. FERGUSON.

*Default Judgment—Motion to Set aside—Defence—Merits—
Leave to Defend—Terms—Judgment Standing as Security
—Costs.*

Motion by defendant Ferguson to set aside a default judgment entered by plaintiffs.

M. R. Gooderham, for defendant Ferguson.

C. A. Masten, for plaintiffs.

THE MASTER:—Ferguson and Dickson are sued on a demand note for \$5,000 and a guarantee of the account of a company of which they were treasurer and president respectively.

The company is in liquidation, but no dividend has yet been issued. Dickson entered an appearance, but, through some mistake, this was not done on behalf of Ferguson.

Both defendants have made affidavits setting up the defence which the defendants were allowed to make in *Dominion Bank v. Crump*, 3 O. W. R. 58. Both of them have been cross-examined, but are not shaken in their statements of the agreement made with plaintiffs' manager when the documents in question were given, when they were all present together. The joint presence of both defendants makes this case in that respect similar to the ruling case of *Jacobs v. Booth's Distillery Co.*, 85 L. T. 262, 5 O. W. R. 49.

The plaintiffs have not moved for judgment against Dickson, nor could they hope to succeed if they did so, after the decision of Mr. Justice Street in *Imperial Bank v. Tuckett*, 6 O. W. R. 121. It may not be without interest to record the fact that when that case came on for trial the defendant never even put in an appearance, and judgment went as of course. Nevertheless I am still bound by that decision.

If Ferguson had not unfortunately allowed the time to go by, he could not have been prevented from having his defence tried out. As it is, the question is as to the terms on which this is to be allowed.

With the continuous non-jury sittings at Toronto, no great harm can be done to plaintiffs by allowing the matter to proceed in the usual way, provided that defendant facilitates the speedy trial of the action. He is not in any stronger position than was the defendant in *Merchants Bank v. Scott*, 16 P. R. 90, and I think that the judgment should stand until the determination of the action, and that the same order should be made as to costs.

If the defendant prefers to have the judgment set aside, he can do so on giving security to the amount of \$3,000.

CLUTE, J.

DECEMBER 24TH, 1906.

WEEKLY COURT.

RE TOWNSHIP OF NORMANBY AND TOWNSHIP OF CARRICK.

Highway—County Boundary Line Road—Deviation—Adoption of Road already Constructed—Municipal Act, sec. 654—Construction—Award—Jurisdiction of Arbitrators—Absence of Necessary Preliminaries—Counsel Attending before Arbitrators under Protest.

Appeal by corporation of township of Carrick from the award dated 8th November, 1906, of William John Hatton, Judge of the County Court of Grey, and James Millroy Thompson, Warden of the county of Grey, made under the provisions of secs. 654 and 656 of the Municipal Act, 1903.

county of Bruce, one of the arbitrators, refusing to join in the award.

H. J. Scott, K.C., and D. Robertson, Walkerton, for the appellants.

W. H. Blake, K.C., for the corporation of the township of Normanby.

CLUTE, J.:—The principal grounds argued were that the arbitrators had no authority or jurisdiction to act in the premises; that the road in question was not in fact a deviation road; that the road in question had never been adopted by the council of either municipality; that no by-law was passed declaring it impracticable to construct the road along the county boundary line between the township of Normanby and the township of Carrick; that after the passing of 6 Edw. VII. ch. 34, sec. 35, no application was made, by the corporation of Carrick to agree to the respective shares of money to be paid or the work to be done in opening up and maintaining such alleged deviation road, and therefore that there was no refusal and no inability to agree, which was necessary, under sec. 656, to give such arbitrators jurisdiction; that the real object of the proceedings was to compel the erection of a new bridge on the road, at the joint expense of the corporations of the county of Bruce and county of Grey, under the provisions of sec. 617 of the Municipal Act.

It does not appear that any by-law in respect of this matter was passed by either township council. It does appear by the affidavit of Mr. McKay, which was not disputed, that in or about the month of August, 1904, at a special meeting of the township council of Normanby, after viewing the ground, the council passed a resolution declaring it impracticable to construct a way along the county boundary line over a portion of the county boundary line between the township of Normanby and the township of Carrick, and being that portion of the boundary line dealt with by the arbitrators in the award now sought to be set aside. The affidavit further states that the minutes of the council shew that the resolution was passed on 27th June, 1905, by the township council of Normanby, declaring that it is imprac-

Proceedings were then taken to arbitrate under the Act, and the award in question was made by the County Court Judge and the Warden of the county of Grey—the Warden of the county of Bruce refusing to sign.

Before evidence was taken, counsel for the township of Carrick took the objection that “there is no foundation for this arbitration, there being no refusal on the part of the township of Carrick to agree, etc., in the matter, the inability to mutually agree set forth in Mr. McKay’s affidavit being before the amendment of 1906.” The objection was overruled (Robb, the Warden of Bruce, dissenting). It was further objected that, “as the object of Normanby township in this arbitration is to have an already established road in that township declared and adopted as a deviation road, and as upon that road there are two bridges coming under sec. 617 of the Act, the county councils should be notified and given an opportunity to be heard.” “Objection overruled.” Mr. Robertson then asked an adjournment of the arbitration, on the grounds set out in his affidavit, to allow a motion to be made to the High Court to test the correctness of the rulings on the above objections. This was also overruled, and the arbitration then proceeded, the solicitor of the council for Normanby taking part in the arbitration. . . .

Section 654 of the Consolidated Municipal Act, 1903, was amended by 4 Edw. VII. ch. 22, sec. 28, by inserting after the word “thereto” in the fifth line, the words “or of making a deviation where in the opinion of any of the said councils it is impracticable to construct a road along the said county boundary line.” 6 Edw. VII. ch. 34, sec. 35, repealed the above amendment and inserted in lieu thereof the following words: “Or of making a deviation of a portion of such county boundary line or of adopting a road or highway already constructed as a part or the whole of such deviation where in the opinion of the said councils it is impracticable to construct a road along the said county boundary line.”

The section now reads as follows:—

“654. Whenever the several townships interested in the whole or any part of any county boundary line road are unable mutually to agree as to their respective shares of money to be paid or work to be done or of both, in opening

or maintaining such boundary line road, or portion thereof, or of making a deviation of a portion of such county boundary line road, or of adopting a road or highway already constructed as a part or the whole of such deviation, where in the opinion of any of the said arbitrators it is impracticable to construct a road along the said county boundary line; one or more of such township councils may apply to the wardens of the bordering counties to determine jointly the amount which each township shall be required to expend on such road, either in money or statute labour, or both, and the mode of expenditure; the County Judge of the county in which the township first making the application is situate shall in all cases be the third arbitrator."

It will be seen from the above that the words "or of adopting a road or highway as already constructed as a part or the whole of such deviation" were for the first time introduced by the Act of 1906. Now the road in question is and has been for more than 50 years a road or highway, and the award adjudges that the roadway in question and therein described be adopted as a deviation of that portion of the county boundary line between the townships of Normanby and Carrick lying adjacent thereto, "it being impracticable in the opinion of the said municipal corporation of the township of Normanby to construct a road along the said portion of the said county boundary line." The award then further provides for the cost of maintenance, and appoints commissioners, and apportions the costs of the arbitration.

It is quite clear that after the Act of 1906 was passed no action was taken by the township of Normanby with a view of ascertaining whether it was possible for the interested townships to mutually agree in regard to this matter: all that had been done prior to that was the passing of a resolution by the council of Normanby declaring the county boundary impracticable, and an endeavour by their solicitors to have a meeting of the interested townships with a view of arranging the matter. The township of Carrick did not commit itself in any way, consistently taking the position throughout that there was no jurisdiction to arbitrate in the present case.

It was not contended before me that there was jurisdiction prior to the Act of 1906, and it may well be that, although the township of Carrick refused to meet the township

been willing to negotiate after the passing of the Act. However this may be, I do not think that the necessary preliminary action was taken on the part of the township of Normanby after the passing of the Act and prior to the proceedings to arbitrate, to enable it to take such proceedings. It is true the reeve of Carrick wrote the letter above referred to, but he denied expressly that he had authority from the council of Carrick to write the letter. He states further that it was not discussed at any meeting of the council. This statement is again contradicted, so that the matter is left in that uncertain state.

As the township of Carrick have protested throughout these proceedings, I do not think they were bound, although they attended under protest during the taking of the evidence. There should, I think, have been clear and distinct action taken by the township of Normanby, communicating as a council with the township of Carrick, to endeavour to mutually agree before proceedings were taken. In a matter of so much importance as the present, it ought not to be left to the Court to gather from contradictory evidence whether or not any such attempt was ever really made, or whether, although an attempt was not made, the intention, in fact, was to disagree to any proposed arrangement. So that upon this ground the appeal should be allowed and the award set aside.

The Court was asked, however, by counsel for the township of Normanby to express an opinion as to whether, assuming that the preliminaries had been properly taken, the Act was broad enough to cover a case of this kind. It certainly is somewhat obscure. It was insisted that there was no power to arbitrate with the view of adopting a road or highway already constructed, and that the Act only extended to the case of the expenditure of money when the road was adopted, and that if the municipalities concerned did not see fit mutually to adopt a road as a deviation road the Act did not cover such a case and there was no remedy. The Act provides "that whenever the several townships interested in the whole or any part of any county boundary line road are unable mutually to agree as to their respective shares of money to be paid or work to be done or both in opening or maintaining such boundary line road, or a portion thereof, or of making a deviation of a portion of such

county boundary line road, or of adopting a road or highway already constructed as a part or the whole of such deviation, where, in the opinion of any of the said councils, it is impracticable to construct a road along the said county boundary line, one or more of such township councils may appoint, etc. It is insisted that this has relation simply to the expenditure of money, and the arbitration has reference simply to the respective shares of money so to be expended.

I am of opinion that the words introduced by the amendment are broader than the construction contended for, and that the intention of the legislature was to afford a means, where the municipalities could not agree, to adopt a road or highway already constructed as a part of a deviation road and also of providing for its maintenance. It seems absurd to suppose that the legislature, while providing for the means of maintaining the road, should not provide for the road itself. That, I think, is manifestly implied, and I am of opinion that the arbitrators in that regard had jurisdiction to deal with the matter. Nor do I think that the fact that the road in question is half a mile from the boundary line prevents it from being adopted as a deviation road. . . .

It is worthy of note that the road in question was established more than 50 years ago by user; at first a trespass road, probably to lead to a mill, but recognized since, as in fact it is, a deviation road, offering the convenience of a deviation road, and, in the view of the arbitrators at all events, a proper deviation road.

It was not contended before me that upon the evidence the award could be attacked, nor was it asked that either party should be allowed to put in further evidence, under sec. 64 of the Act of 1903.

Township of Fitzroy v. County of Carleton, 9 O. L. R. 686, 5 O. W. R. 615, was cited as shewing that the road in question could not be a deviation road, because it did not return to the county boundary except by a side line road already opened, but, upon reference to that case, so far as it applies, I think it rather supports the award in that regard. The road in fact does return to the boundary, although by a side road already travelled.

sent to the matter standing until the legal question could be considered, I think the appellants are entitled to their costs.

Appeal allowed and award set aside with costs.

DECEMBER 24TH, 1906.

DIVISIONAL COURT.

RE TOWNSHIP OF AMELIASBURG v. PITCHER.

*Division Courts—Jurisdiction—Interpretation of Statute —
Public Health Act—Prohibition.*

Appeal by defendant from order of MEREDITH, C.J., in Chambers, refusing prohibition to the 4th Division Court in the county of Prince Edward.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.

C. J. Holman, K.C., for defendant.

W. S. Morden, Belleville, for plaintiffs.

RIDDELL, J.:— . . . The action was brought in the Division Court claiming payment by defendant as mother of a person infected, for whom expenses had been incurred under sec. 93 of the Public Health Act, R. S. O. 1897 ch. 248. Judgment was given by the County Court Judge in favour of plaintiffs for \$100, the amount claimed. . . .

Several grounds were taken before us, all but one of which we disposed of on the argument. The sole remaining ground is as follows. It is argued that the trial Judge has interpreted the statute, R. S. O. 1897 ch. 248; that this statute gave no cause of action; and that, therefore, he had no jurisdiction.

I do not think that the position is sound. I think the true rule established by *Re Long Point Co. v. Anderson*, 18 A. R. 405, and similar cases, is that if it be necessary to interpret a statute in order to find out whether the Divi-

sion Court should decide the rights of the parties at all, then if the Division Court Judge misinterprets the statute, and so gives himself jurisdiction to decide such rights, prohibition will lie, but if it be necessary to interpret a statute simply to decide the rights of the parties, prohibition will not lie, however far astray the Division Court Judge may go.

This case comes within the latter category, and consequently this appeal should be dismissed with costs.

I should add that I do not suggest that the judgment is not right in law. I simply say that this Court has no right to inquire into that question.

FALCONBRIDGE, C.J., and BRITTON, J., each gave reasons in writing for the same conclusion.

DECEMBER 24TH, 1906.

C.A.

BEATTY v. McCONNELL.

Assessment and Taxes—Tax Sale—Deed by Provincial Treasurer—Registry Laws—Purchaser in Good Faith—Trustee—Fraud and Misrepresentation—Crown Patent—Evidence—Parties—Solicitor—Costs—Discretion—Appeal.

Appeal by plaintiff and cross-appeal by defendant Gregory from judgment of STREET, J., 6 O. W. R. 822, 7 O. W. R. 11, dismissing action to set aside a tax sale deed and a subsequent conveyance and to recover possession of the land comprised in the conveyances.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

W. Nesbitt, K.C., and T. P. Galt, for plaintiff.

S. H. Blake, K.C., and T. D. Delamere, K.C., for defendant Bull.

J. H. Moss, for defendant McConnell.

I. F. Hellmuth, K.C., for defendant Gregory.

Moss, C.J.O.:—The plaintiff, J. W. Beatty, claiming to be the owner in fee of two parcels of land, being the south-east quarter of section 8 in the 8th concession, and the north-east subdivision of the said section 8, all in the township of McTavish, in the district of Algoma, as the purchaser and grantee of the same from Mr. W. H. Beatty, brought this action against defendants to set aside a deed of conveyance of the said lands made by the Treasurer of the Province of Ontario to the defendant Bull, and a deed of conveyance of the same lands made by the defendant Bull to the defendant McConnell, and to remove said deeds from the records of the registry office as a cloud on plaintiff's title.

The defendant Gregory was made a party because—as is charged—he was concerned with his co-defendants in an alleged scheme to deprive plaintiff of the land.

At the trial the plaintiff applied for and obtained leave to add the Attorney-General as a party plaintiff.

The learned trial Judge in a considered judgment dismissed the action with costs as against the defendant McConnell, and without costs as against the other defendants. The plaintiff appealed on the whole case, and the defendant Gregory, by leave of the learned trial Judge, appealed from the judgment in so far as it deprived him of his costs. The main facts are sufficiently stated in the opinion delivered by the trial Judge.

After a careful consideration of the evidence, I am unable to agree with the Judge's conclusions as to the effect of the evidence concerning the dealings by defendant Bull with the certificates of the tax sale, and their subsequent receipt and retention by Mr. W. H. Beatty under the circumstances narrated in the evidence. It is not disputed that Mr. W. H. Beatty was the owner of the parcels up to the time of their sale for taxes. No question is raised as to the regularity of the sale for taxes and the purchase thereof by defendant Bull, nor as to his having received from the Provincial Treasurer the certificates required to be given to the purchaser by R. S. O. 1897 ch. 23, sec. 20. The dispute is as to what took place subsequent to these occurrences, and as to what should be the conclusion from the facts shewn in evidence.

been drawn and the address "W. H. Beatty, Esq.," written in Mr. Leys's handwriting underneath the former address. There was probably a letter from Mr. Leys to Mr. Beatty, enclosed with the certificates, but I merely note the fact and do not refer to its contents. The envelope containing the certificates was placed by Mr. Beatty with his title deeds of the parcels, and they remained there until about the time of the commencement of this action. Mr. Beatty stated in his evidence that at or shortly after the receipt of the envelope, he paid Mr. Leys \$50 in respect of the transaction, and afterwards, Mr. Leys having died, he made some further payment to one of his heirs. In explanation of this he stated that Mr. Leys was interested with him in the parcels. If so he would be interested with him in preventing them from being lost through the sale for taxes, and there can be no doubt that whether in the interest of Mr. Beatty or of himself or of both, Mr. Leys was actively intervening with that object. And Mr. Beatty further stated as an explanation of his leaving the certificates with the title without any further action upon them, that he supposed, having obtained them, that the taxes were paid down to the date of the tax sale, and that he was then the owner.

Messrs. Bull and Ledyard, unfortunately, are unable to recall any of the circumstances, though they recognize and admit the authenticity of the letter and receipt produced from the department. No imputation is made upon their good faith in this respect, and there is no suggestion of any improper dealings by Mr. Ledyard, or that the certificates reached Mr. Leys and ultimately Mr. Beatty by way of clandestine appropriation or in fraud of Mr. Bull.

Weighing these circumstances with the other evidence, I think they warrant the conclusion that Mr. Leys undertook and agreed with Mr. W. H. Beatty to redeem or get in Mr. Bull's claim under the certificates; that he was in fact Mr. Beatty's agent for that purpose; that Mr. Ledyard, who had acted for Mr. Bull in buying at the tax sales, and was conversant with the usual course of dealing with certificates, was acting for Mr. Bull in the dealing indicated in the latter's letter to Mr. Percival of 26th January, 1889; that Mr. Bull authorized the department to hand to Mr. Ledyard the certificates in question, and directed it not to prepare deeds to him of the lands embraced in them, be-

cause, as he said, he had agreed to assign them; that the certificates were thereupon given up by the department to Mr. Ledyard in order to enable the latter to complete the arrangement; that for value and by way of completion he handed the certificates to Mr. Leys, who handed them to Mr. W. H. Beatty, the owner of the land, who paid Mr. Leys therefor and deposited them with the title deeds under the supposition and belief that, having purchased and obtained possession of the certificates, he had thereby put an end to all claim of the tax purchaser to a deed of conveyance from the Provincial Treasurer, and that his title as owner was thus cleared of the tax sale; that Mr. Bull intended to part with his title to and to cease to be the owner of the certificates and to extinguish his claim under them; that, acting on the arrangement so made, he withdrew his claim to deeds for the parcels, and made no other claim until over 15 years afterwards, and then only made it when in investigating titles to other properties it was seen that he appeared to be the purchaser of these parcels at the tax sales, and he had forgotten the facts; that his claim was then put forward in entire forgetfulness of the facts, and was afforded some shew of support by the failure after search to find anything in the records of the department contrary to his claim, and the assurances of the officers of the department to the same effect; and that, if the letter of 26th January, 1889, and Mr. Ledyard's receipt for the certificates had been found and produced in the beginning, Mr. Bull would not have applied for and the department would not have issued a deed of conveyance to him.

If these findings be correct, Mr. W. H. Beatty could have restrained the defendant Bull from seeking to obtain a deed of conveyance from the Treasurer. In forgetfulness of the facts, Mr. Bull made statutory declarations which he otherwise would not have made, and the department, with the papers in its archives, but forgotten and overlooked by the officials in their searches, issued the deed of conveyance now in question.

But the statements in the statutory declarations, or the action of the department, could not and did not alter the true facts or the real position of the parties at the date of the issue of the deed. Mr. Bull was not then the owner or holder of the certificates, and could not require the treasurer to issue a deed of conveyance under the provisions of

By sec. 20 of the statute, the Treasurer is required, after selling any land for taxes, to give a certificate to the purchaser stating certain particulars, and also that a deed conveying the same to the purchaser or his assigns will be executed by the Treasurer on his or their demand, at any time after the expiration of a year from the date of the certificate if the land be not previously redeemed. This necessarily involves the production of the certificate or a satisfactory explanation of its non-production. The effect of the certificate is not to vest the title absolutely in the purchaser. He only becomes the owner so far as to have all necessary rights of action and powers for protecting the same from spoliation or waste until the expiration of the term during which the land may be redeemed: sec. 21.

It is thus apparent that the certificate falls short of operating as a transfer to the purchaser of an absolute title to the lands. Such as the title is, it is liable to be divested by the owner redeeming within a year (sec. 22), or by the purchaser putting it out of his power to produce it and demand a deed under sec. 26. Reference to sec. 183 of R. S. O. 1887 ch. 193, which is made applicable to sales by the Provincial Treasurer under R. S. O. 1887 ch. 23, sec. 31, shews the limited effect of the certificate. That section provides that the deed to be given shall be in the form prescribed . . . and shall have the effect of vesting the land in the purchaser, or his heirs and assigns, or other legal representatives, in fee simple or otherwise according to the nature of the estate or interest sold. It is only by a deed validly executed by the Treasurer in accordance with these provisions and the provisions of sec. 26 of R. S. O. 1887 ch. 23, that the title to the land becomes vested in the purchaser. Up to that time the certificate gives the purchaser, if he continues to hold it, no more than a title to maintain or recover possession for the purposes mentioned in sec. 21 of R. S. O. 1887 ch. 23: *Cotter v. Sutherland*, 18 C. P. 357.

Then did the defendant Bull acquire the title to the parcels in question by the deed made to him by the Provincial Treasurer?

According to many cases decided in American Courts, what was done in this case may well be regarded as a redemp-

ing with his property and ownership in the certificates, and extinguishing his claim under them, the result is the same.

If it were the latter, as I am inclined to regard it, it was, so far as the defendant Bull is concerned, a completed transaction, and he could lay no claim to the lands.

The power of the Provincial Treasurer to make a deed of conveyance to the purchaser is made by sec. 26 to depend on two things—the non-redemption of the lands and the continuance of ownership of the certificate by the purchaser. He can only convey to the purchaser or owner or holder of the certificate.

Here the defendant Bull, the purchaser, had parted with his ownership, and was not entitled to require or demand a deed of conveyance from the Treasurer. No doubt, the actual production of the certificate would not in every case be a bar to the Treasurer making a valid deed of conveyance. If, without the purchaser having parted or agreed to part with his property in it, it was lost or destroyed, and such loss or destruction was satisfactorily established, and it was clear that the purchaser was still the owner, though, by reason of the loss or destruction, not the holder, there would be a valid reason why the Treasurer should not make the deed which the statute provides that he is to make. But here the facts were otherwise, and, in my opinion, the Treasurer could not and did not convey the lands so as to pass any title thereto to the defendant Bull. No estate was vested with the Treasurer. He had only a power to convey upon the happening of certain events, and the power could only be executed in accordance with its terms. A deed executed otherwise is not an execution of the power.

It follows, therefore, that defendant Bull was unable to pass any title to defendant McConnell.

The registry law affords no protection to the latter, for, as neither the Provincial Treasurer nor the defendant Bull had anything to convey, they were in fact strangers to the title. The title in fee still remained in plaintiff. No deed had been made which had the effect of passing the title out of him, and the registration of a wholly invalid deed could not defeat his title any more than could the registration of a forged instrument: *Doe Spafford v. Breckenridge*, 1 C. P. 492, 505. The registry laws have really no application.

ance to defendant Bull and defendant McConnell respectively. The question is, did the latter conveyances divest or defeat plaintiff's title? And the fact of their registration does not in any way aid in determining it.

On these grounds, I think plaintiff entitled to a declaration such as he seeks, that the deeds of conveyance to the defendant Bull and the defendant McConnell are invalid as against him and that their registration forms a cloud on his title.

With regard to the cross-appeal of defendant Gregory, I find nothing in the case to warrant his being a party to the action. His sole connection with the matter was as solicitor for defendant McConnell in carrying through the purchase of the parcels from defendant Bull.

The testimony of defendant Bull, of Mr. Percival, and of defendant Gregory himself, shews that he had nothing to do with the preparation and filing of the declarations on which the deeds issued, and never saw them until after the commencement of the action. He had no knowledge or suspicion of the existence of defendant Bull's letter to Mr. Percival or Mr. Ledyard's receipt for the certificates. In point of fact these had been filed away somewhere in the department, and, as Mr. Percival said, had not been seen by human eye for 16 years. The letter was only found on the first day of the trial, and the receipt was not found and produced until the second day. And it is probably not too much to say that without their production plaintiff's case would have been hopeless. There was no real or substantial ground for the charge of conspiracy or combination to deprive plaintiff of his title, and, so far as that branch of the case was concerned, defendants Bull and Gregory were entitled to be fully exonerated.

In my opinion, defendant Gregory was neither a necessary nor a proper party to the action. It is only necessary to refer to the cases from which citations are made in *Canada Carriage Co. v. Lea*, 11 O. L. R. 177, 6 O. W. R. 633, to shew the attitude of the Courts and Judges on the subject of making solicitors or agents parties to actions, when their sole connection with the matters is that they acted as such in the transaction. The charge of conspiracy or combina-

position of the costs of and incidental to all proceedings in the discretion of the Court or Judge. Leave to appeal has been granted, but, notwithstanding that fact, the same regard is to be had to the discretion of the Judge as in other cases in which his discretion is subject to review. In *Young v. Thomas*, [1892] 2 Ch. 134, Bowen, L.J., said (p. 137): "The head-note in *In re Gilbert*, 28 Ch. D. 549, clearly expresses the law on this point." The head-note is: "Where an appeal from an order as to costs which are left by law to the discretion of the Judge is brought by leave of the Judge, the Court of Appeal will still have regard to the discretion of the Judge, and will not overrule his order, unless there has been a disregard of principle or misapprehension of facts."

In *Civil Service Co-operative Society v. General Steam Navigation Co.*, [1903] 2 K. B. 756, the Earl of Halsbury, L.C., discussing the language of the first part of Order LXV., r. 1, which is similar to that of Con. Rule 1130, said (p. 765): "No doubt, where a Judge has exercised his discretion on certain materials before him, it may not be and I think is not within the power of the Court of Appeal to overrule that exercise of discretion." See also the recent case of *King v. Gillard*, [1905] 2 Ch. 1, an action against the defendants for passing off their goods for those of the plaintiffs, in which the trial Judge gave judgment for the defendants, but, because the defendants had stated on the wrappers in which their goods were sold that they had obtained certain medals and awards at exhibitions, but did not state that they were obtained in respect of other goods and not those to which the action related, he refused them their costs. And on appeal it was held that there was no ground for the exercise of the discretion.

In this case if it could be said, as in some of the cases I have referred to, that there was absolutely nothing before the learned trial Judge on which he could exercise his discretion, then the primary right of the successful defendant to his costs should be given effect to.

But I am unable to say that there were no materials before the learned Judge. And while I may say that if I

they should be paid by plaintiff, that is not now the sole question.

The difficulty now is in saying that the learned Judge was not entitled to exercise his discretion on the question. On the whole I think he was. I think, therefore, that the cross-appeal should be dismissed, but without costs.

Plaintiff's appeal is allowed with costs here and below against defendant McConnell. No costs to or against defendant Bull.

OSLER, GARROW, and MEREDITH, JJ.A., each gave reasons in writing, for the same result.

MACLAREN, J.A., also concurred.

DECEMBER 24TH, 1906.

C.A.

FAIRBAIRN v. TOWNSHIP OF SANDWICH SOUTH.

Municipal Corporations — Drainage — Petition for Work — Majority of Owners to be Benefited—Assessment for Outlet —Assumption of Award Drain—Enlargement and Extension into New Territory—Exit—Pipe under Railway Embankment—Enlargement—Effect.

Appeal by plaintiff and cross-appeal by defendants from judgment and report of J. B. Rankin, Drainage Referee, dismissing without costs an application by plaintiff to set aside a by-law of the council of defendants.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

J. H. Rodd, Windsor, for plaintiff.

A. H. Clarke, K.C., for defendants.

GARROW, J.A.:—The Canada Southern Railway track, built about the year 1882, passes through plaintiff's lands in the township of Sandwich South.

thing in the nature of a watercourse through plaintiff lands, which had been deepened by the township, by means of which the surface waters in times of freshet escaped in a northerly direction across what is now the railway roadbed. The lands, however, on both sides, are low-lying, and appear never to have been perfectly dry and fit for general cultivation, although before the railway was built, and for some years afterwards while the original 6-foot culvert was maintained, he was able to cultivate at least parts of them with fair results. Some 10 years ago this culvert was removed, and instead a 3-foot pipe was inserted, and ever since then his lands on both sides of the railway have suffered from flooding, and have largely ceased to be useful except for pasturage. All the lands in the vicinity appear to be flat and low. Various ditches or drains have been from time to time constructed, but none was apparently fully effective, and indeed, so far as plaintiff's lands are concerned, would seem only to have increased the nuisance, as was perfectly natural, considering that more than one award drain was carried towards the south end of the insufficient 3-foot pipe through the railway roadbed, the only exit for the water from that side, and were there left to find their way as they best could through that pipe. Another system of local drainage was carried along the Talbot road easterly, and thence northerly along the 9th concession road to another pipe beneath the railway, 5 feet in diameter, and through these two pipes all the surface water in the vicinity on the south side of the railway, seeking its natural outlet toward the north, had to find vent, or overflow the lands of plaintiff and others near the railway. In these circumstances, a petition was presented to the council asking that a certain defined area, including plaintiff's lands, might be drained by means of a drain or drains, including the assumption of what was known as the Talbot road award drain, before referred to.

The council received the petition and referred the matter to the township engineer for report, and he recommended that the Talbot road award drain should be assumed as a municipal drain, and be deepened and widened to a size sufficient to effect the purpose for which it was originally intended; and to relieve the north-east quarter of lot 301, N. T. R., from flooding, and to provide a proper

8th concession (plaintiff's lands) be opened up and the outlet extended north-east through these lots along the Fairbairn creek to the 9th concession road. He also reported that the 3-foot pipe under the railway is too small; that he had laid the matter before the Railway Committee; and that a new pipe, to be 4 feet in diameter and sunk to a depth of some 18 inches more than at present, has been ordered, which pipe has since been put in. And he submitted plans and specifications of the proposed work and an estimate of its cost and a schedule of assessments, plaintiff's amounting to \$6 for benefit and \$2 for outlet.

The council adopted the report, and on 11th November, 1905, passed a provisional by-law in the usual form for that purpose and to give effect to its recommendations, including the assumption of the Talbot road award drain, which was thereby assumed.

Plaintiff then began these proceedings to set aside the by-law, etc., and in the notice of application formulated his complaint thus: (1) petition insufficiently signed; (2) other preliminaries (not specified) were not complied with; (3) no proper outlet; (4) water diverted out of its natural course.

Upon the matter coming before the referee, some 20 witnesses were examined, three of them civil engineers, and in the result he upheld the by-law, but, with the consent of the engineer, amended his report so as to include the deepening of the Talbot road drain easterly to the 5-foot pipe, and dismissed the application without costs.

In the argument before this Court counsel for plaintiff renewed his contentions: (1) that the petition was insufficiently signed; (2) that the council could not assume an award drain and in the same by-law authorize its enlargement and extension; and (3) that the outlet through the 4 foot pipe is insufficient to carry away the increased waters which will under the present scheme be brought to it.

The petition was, I think, sufficiently signed by a majority of the owners to be benefited under sec. 3, sub-sec. 1, of the Municipal Drainage Act, as amended by 6 Edw. VII. ch. 37, sec. 1. Mr. Rodd contended, and it was necessary for his success on this point to contend, that one or

assessed for outlet, and were therefore improperly made petitioners. I am, however, very far from being convinced that the engineer's conclusion in assessing them for benefit is incorrect.

It is not disputed that a majority of the owners of the Talbot road award drain were petitioners, as required by sec. 84, but that alone would not, I think, be sufficient where, as here, the council not merely assumes the award drain, but proceeds to enlarge and extend it into or through new territory.

I can see no legal objection to the council, on a proper petition, passing a by-law assuming an award drain, and in the same by-law making it a part of a more extended scheme under the Municipal Drainage Act, which is really what has been authorized by the by-law in question.

My chief difficulty in the case has been caused by a consideration of the evidence as to the alleged insufficiency of the 4-foot pipe—whether, in other words, the alleged “improvement” is not really going to be an injury rather than a benefit to plaintiff. It is not merely a matter of relief from his small assessment. If that were all, the case would scarcely be worth considering. But there is a very respectable body of evidence which points to the probability that his lands will, in consequence of the present scheme, be still more flooded in the future than in the past. And, while I still doubt, I am not upon the whole convinced that the Referee erred in supporting the by-law and dismissing the application. Plaintiff admits that for many years his lands have been flooded to an extent which greatly impairs their usefulness. And it would seem a fair inference that this might fairly be attributed largely to the insufficiency of the 3-foot pipe. The engineers say that the 4-foot pipe has double the carrying capacity of the former one, and it has been lowered to a more useful depth. The waters which by the new scheme will be carried to it as an exit will be, it is true, increased in quantity. But not all of the waters carried in the old Talbot road award drain will go by the new way, especially with the work done directed by the amendment ordered by the Referee, of which I entirely approve. And upon the whole I am of the opinion that the weight of evidence warrants the conclusion that the new pipe in its new position will not only provide for such in-

creased water, but that it will the more speedily remove the other waters which formerly came to the old pipe, and which, failing to escape through it, overflowed plaintiff's lands. The way proposed seems the natural way; it is the shortest; it avoids some unnecessary angles; and it conserves the fall: all circumstances of importance in favour of the proposed scheme.

Plaintiff's appeal dismissed with costs, and defendants' cross-appeal also dismissed with costs.

MOSS, C.J.O., OSLER and MACLAREN, J.J.A., concurred.

MEREDITH, J.A., agreed in the conclusions, for reasons stated in writing.

DECEMBER 24TH, 1906.

C.A.

FEDERAL LIFE ASSURANCE CO. v. STINSON.

Mortgage — Redemption — Priorities — Execution Creditors Proving Claims in Master's Office—Payment of Mortgagee's Claim—Subsequent Statutory Assignment for Creditors—Rights of Assignee—Assignments and Preferences Act, sec. 11.

Appeal by defendant Scott from order of a Divisional Court, 7 O. W. R. 177, dismissing appeal by defendant Scott from an order of FALCONBRIDGE, C.J., allowing an appeal by defendant Swanson from a ruling of the Master at Hamilton in a mortgage action.

There was a motion by defendant Swanson to quash the appeal, which was dismissed at the hearing, the costs of it being reserved.

The appeal and motion were heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, J.J.A.

D. L. McCarthy, for defendant Scott.

H. Cassels, K.C., and R. S. Cassels, for defendant Swanson.

defendants' interests, plaintiffs claiming upon a mortgage made by the defendants the Stinsons. The usual judgment for foreclosure or redemption was directed, and the usual inquiries and accounts ordered to be made and taken by the local Master at Hamilton.

In the course of the proceedings before him the defendants Sullivan, Bradley, Cashman, and Campbell, 4 execution creditors of the mortgagor, were made parties to the action, and proved claims upon their respective judgments.

On 29th May, 1905, the Master made his report finding that the plaintiffs and these creditors were the only incumbrancers upon the mortgaged premises. A day was appointed by the report for payment by the latter of the amount found due to plaintiffs as mortgagees.

After the filing and confirmation of the Master's report, and shortly before the day fixed for payment, one William J. Swanson, the present respondent, obtained assignments of the judgments held by the 4 subsequent incumbrancers, and, by the Master's order of 28th November, 1905, he was, as such assignee, added as a party defendant to the action, which was continued and ordered to stand as to him and the other defendants in the same plight and condition as before.

Swanson then redeemed the mortgagees by payment of the \$12,681 found due to them by the report, and the Master proceeded to take a subsequent account as between him and the mortgagors in respect of his claim on the mortgage and the judgments. By a further report dated 12th December, 1905, the Master found the total sum due to the respondent on this footing, with subsequent interest and costs up to 12th January, 1906, to be \$24,340.36, which he appointed to be paid to the respondent by the mortgagors on the last mentioned day.

This report was also duly filed and confirmed.

On 2nd January, 1906, the defendant Stinson made an assignment under the Assignments and Preferences Act to one Charles S. Scott, upon whose application an order was made by Mabee, J., on 9th January, 1906, extending the time for redemption by the defendants Stinson for one month from 12th January, 1906, adding Scott as a party to

or new account and appoint a new day for redemption.

On the matter again coming before the Master, he ruled and certified, inter alia, that he should open the whole mortgage account, and that the defendant and now appellant, Scott, as assignee for the creditors of Stinson, was entitled to redeem by paying the amount of the mortgage claim and in priority to the claims of the execution and judgment creditors held by the respondent Swanson. On appeal by the latter, an order was made by Falconbridge, C.J., for which no reasons seem to have been reported, setting aside the certificate, and referring the action back to the Master to take a new account of the amount due to Swanson "as assignee of the plaintiffs and as assignee of the subsequent incumbrancers, as set forth in the reports of the 29th May and 12th December, 1905," and to appoint a new day for redemption on payment by Scott to Swanson of the whole. Scott in his turn appealed from this order to a Divisional Court, contending that the Chief Justice had no jurisdiction to interfere with the order of Mabee, J., and the direction given thereby, and had erred in holding that Scott, as assignee for the benefit of creditors, did not under the statute take priority over the creditors whose claims had been proved in the Master's office and acquired by Swanson, and that Scott was not entitled to redeem the mortgage irrespective of such claims. He also moved to have the judgment of foreclosure turned into a judgment for sale, etc.

The Divisional Court dismissed the appeal, but also ordered that the appellant might have a sale, if he chose to pay into Court \$300 as security for the costs and expenses of the proceeding, and complied with the other conditions imposed by the order. Further accounts were in that event directed to be taken, and the sale was to take place without the appointment of a new day. In the event of a sale taking place, it was further ordered and declared that Swanson was entitled to be paid out of the proceeds in priority to Scott, the amounts due in respect as well of the mortgage as of the judgments.

From this order Scott, being still dissatisfied, has brought the present appeal. A motion before Garrow, J.A., to quash the appeal, on the ground that the appellant had accepted a sale on the terms of the order, and had paid into

argued on the hearing of the appeal.

As regards the motion to quash the appeal, the inclination of my opinion is that the appellant has waived his right to appeal by acting on the alternative given to him by the order he appeals from, and converting the judgment for foreclosure into a judgment for sale upon the conditions which the Court thought fit to impose in granting him the favour he applied for. It is not, however, necessary to decide this, as the case has been argued, and very well argued, upon the merits, and these may form the ground of our judgment.

The appellant relies altogether upon the provisions of sec. 11 of the Assignments and Preferences Act, R. S. O. 1897 ch. 147, substituted for the original sections by 3 Edw. VII. ch. 7, sec. 29: "An assignment for the general benefit of creditors . . . shall take precedence of attachments, of garnishee orders, of judgments, and of executions not completely executed by payment and of orders appointing receivers by way of equitable execution subject to the lien, if any, of an execution creditor for his costs." etc.

He contends that upon the execution of the assignment of 2nd January, 1906, all the proceedings which had theretofore been had in the action affecting the claim of the judgment creditor went for nothing, were reduced, as Lord Eldon expresses it in *Ex p. Knott*, 11 Ves. 609, 619, to dust and ashes, and that he became the only person entitled to redeem the mortgage, to the exclusion of all rights which the judgment creditor had theretofore acquired by such proceedings.

With this contention, leading to so extraordinary and unjust a result, I do not agree, and substantially for the reasons assigned by the learned Chancellor in the Court below.

It seems to me very plain that the case is one not within the contemplation of the Act nor provided for by it.

Before the assignment to the appellant had been executed, the judgment creditor had acquired a new and independent status. He was no longer a mere judgment creditor. As such he never had a lien on the mortgaged premises, and whatever right of that nature he had there-

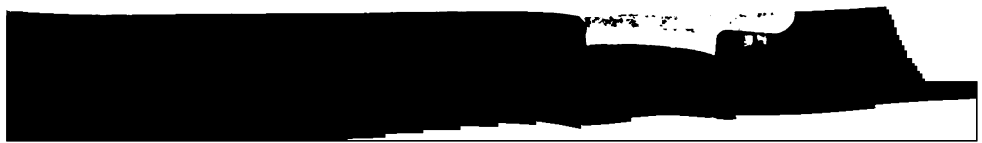
before acquired had ceased to rest upon his executions. These it was no longer necessary for him to renew, nor, having proved his claims on the judgments, as he was required to do in the mortgage action, could he have enforced them against the lands by means of the execution: *Cahuac v. Durie*, 9 Gr. 485. By the adjudication of the Court in this action he was declared to have, and by it he acquired, a lien, charge, or incumbrance upon these lands, and the right as such incumbrancer to redeem the mortgagee, a right which he exercised before the appellant, pendente lite, acquired the equity of redemption by the assignment. Before this, too, his claims on the mortgage and judgments had been consolidated by the report of 12th December, 1905, and his right to be redeemed by the mortgagees, in respect of the whole, declared and adjudicated. An interest or charge of this nature is not affected by the Act any more than would be a mortgage (not obnoxious to the preference clauses of the Act) to secure the amount recovered by the judgments.

This view is supported in principle by the case of *Baker v. Harris*, 16 Ves. 397, cited by Mr. R. S. Cassels. The language of the Bankrupt Act there in question, 21 Jac. I. ch. 19, sec. 9, was not less stringent than that of our Act in postponing the rights of the judgment creditor, but it was held that it related only to judgments which continued merely such at the time of the bankruptcy, not to those which before then had acquired all the effect of an actual mortgage, and for which the creditor had a complete lien on the land. That lien he has acquired in the present case (it is enough to say) by the proceedings in the action. It is not necessary to determine whether as having succeeded to the rights of the first mortgagee he could merely as such, as in that case it was held he could, tack his subsequent judgment to the mortgage as against the assignee. See also *Selby v. Pomfret*, 3 D. F. & J. 595, and *Carter v. Stone*, 20 O. R. 340, 342.

On this short ground I would dismiss the appeal, and with costs, not including the costs of the motion to quash.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., agreed in the result.

MEREDITH, J.A., dissented, for reasons stated in writing.



KERSTEIN v. COHEN.

*Trade Mark—Infringement — Coined Word — Similarity —
Colourable Imitation—Costs—Discretion—Appeal.*

Appeal by plaintiffs from judgment of MULOCK, C.J., 7 O. W. R. 247, 11 O. L. R. 450, dismissing an action to restrain defendants from infringing plaintiffs' trade mark. and cross-appeal by defendants from the part of the same judgment which deprived defendants of the costs of their defence.

The appeal and cross-appeal were heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, J.J.A.

J. A. Macintosh, for plaintiffs.

J. H. Moss and C. A. Moss, for defendants.

MACLAREN, J.A.:—Plaintiffs have appealed from a judgment of Mulock, C.J., dismissing their action for an alleged infringement of their registered trade mark "Shur-On," which they had applied to optical goods manufactured by them.

The infringement complained of was by the use of the word "Sta-Zon," which defendants applied to their optical goods of a similar character.

Plaintiffs' trade mark was registered in Canada on 14th April, 1903, having been previously registered in the United States on 28th July, 1902.

Plaintiffs had brought a previous action against defendants for an infringement of their trade mark by the use of the word "Shur-On," and on 24th March, 1904, a consent judgment was rendered therein, by which defendants were "perpetually restrained from infringing plaintiffs' trade mark in question in this action, by using the word 'Shur-On' in any way in connection with the sale or disposition of optical goods."

Defendants registered "Sta-Zon" as a trade mark on 23rd November, 1904.

It is not necessary, in my opinion, for us, in the circumstances, to pass upon the validity or invalidity generally of either of these trade marks, or to consider how far the

as amended in 1888, and the decisions thereunder, are applicable here under the more general language of our statute, R. S. C. ch. 63, secs. 3 and 12, inasmuch as we can dispose of the case on the question of infringement raised and discussed by the parties.

Under sec. 3 of our Trade Marks Act, a trade mark may be a "mark, name, brand, label, package, or other business device" adopted and applied by any person to products or articles manufactured or sold by him.

In this case the trade mark in question is the hyphenated name or word "Shur-On."

Assuming that plaintiffs have a valid trade mark, they have by sec. 3 of the Act, the exclusive right to use the same, and by sec. 18 the right to maintain an action against any person using the "trade mark or any fraudulent imitation thereof."

Have defendants interfered with such exclusive use or been guilty of fraudulent imitation?

It is not pretended in this case that they have used the entire trade mark, but it is said that they have taken its essential features, and have used a colourable or fraudulent imitation of it.

The trial Judge found that there was really no evidence to establish actual deception, and this part of his judgment was not complained of before us.

It only remains then to consider the two words themselves, and I think the conclusion arrived at in the Court below is the proper one to be drawn from their examination or comparison.

The two appeals in such cases are to the eye and to the ear.

As to the former, it was not very strongly contended before us that there was any great similarity in appearance between the two words. And, indeed, it is only necessary to look at them, either together or separately, to see how essentially different they are in this respect. If the inventor of the second really intended an imitation of the first, he can scarcely be congratulated on his skill or the outcome of his attempt, so far at least as the appearance of the two words is concerned, in any imaginable kind of type or writing that could possibly be applied to the goods in question.

a compound word joined by a hyphen or as a simple word of two syllables separated by a hyphen, in either case the natural pronunciation and that adopted by nearly everybody would be that with a short u. If it is a simple word, every pronouncing dictionary would place the hyphen before the r to give a long sound to the vowel u. The ordinary pronunciation would, perhaps, suggest that the word might have some reference to the wilderness of Shur, through which the Children of Israel journeyed, rather than to the word "sure," as indicating the adhesive or staying qualities of the eyeglasses to which it is applied.

But, even if the first part of "Shur-On" were pronounced like "sure," the sound of the two words would not be any nearer alike than if pronounced as it ordinarily would be, and the ear would not detect any similarity of sound or any suggestion of copying or imitation, fraudulent or otherwise.

But, if plaintiffs' claim is based, not upon any similarity of the two words themselves as to sight or sound, but as to some quality of the goods more or less remotely indicated or to be inferred from the words used, or from the words of which they may be said to be a mis-spelling, then I think it is based upon a fallacy.

Under sec. 3 of the Act, it is the "marks, names, brands, labels, packages, or other devices," themselves, that are trade marks, and that must be infringed, copied, or imitated in order to give a right of action, and not some idea or quality expressed or suggested by them, and descriptive of or embodied in the goods to which they are to be applied.

If a person registers as a trade mark words that describe some quality in the class of goods to which he applies them, he does not thereby acquire the right to object to the application by others of synonymous words expressive of like qualities existing in their goods.

A like rule applies to marks or brands. If, for example, the figure of a horse's head was registered as a trade mark for horse food or medicine, it could hardly be said to be infringed by the figure of a horse's tail, although both figures would naturally suggest the idea of a horse.

We were not referred to any case, nor have I been able to find one, in which it was held that a trade mark composed of words or figures was infringed by other words or

existed in the goods to which the latter were applied.

For a full discussion and statement of our law where words in trade marks more or less descriptive of the goods to which they were applied were in question, see *Provident Chemical Works v. Canada Chemical Co.*, 2 O. L. R. 545, and *Gillett v. Lumsden*, 8 O. L. R. 168, 3 O. W. R. 851.

Plaintiffs' appeal dismissed with costs.

Defendants' have, on leave obtained from the trial Judge, brought a cross-appeal from that part of his judgment which dismissed plaintiffs' action without costs. This was a matter within his discretion, and an appellate court should not interfere with its exercise unless he acted on a wrong principle. There was evidence before him on which he based his exercise of discretion, and I do not think we should interfere with it. The cross-appeal also is dismissed with costs.

OSLER, J.A.:—I agree in dismissing the appeal, substantially for the reasons, or some of them, given in the judgment below. To me the words or distortions which the parties are disputing about are neither visually nor phonetically alike, though the idea intended to be conveyed by each may be the same.

MEREDITH, J.A., gave reasons in writing for the same result.

MOSS, C.J.O., and GARROW, J.A., agreed in the result.

DECEMBER 24TH. 1906.

C.A.

HEATH v. HAMILTON STREET R. W. CO.

Negligence—Injury to Person Bicycling by Overtaking Street Car—Unusual Position of Car—Speed—Defect in Fender—Failure of Plaintiff to Look behind—Contributory Negligence—Proximate Cause of Injury—Evidence for Jury—Findings of Jury.

Appeal by defendants from order of a Divisional Court (ante 32) dismissing appeal by defendants from judg-

the widow of Arthur ... damages for his death caused, as alleged, by the negligence of defendants. Deceased was a member of the fire brigade of the city of Hamilton, and, having been on duty all night, was returning to his home at a few minutes after 7 o'clock in the morning of 4th October, 1905, on his bicycle, when the accident occurred. York street, upon which the accident happened, was being repaired by the city corporation, and, in consequence of the work going on, a car coming behind the deceased was going westward upon the southerly track, but he, supposing it to be on the northerly track, as was usual, turned off the devil strip upon the southerly track, when the car overtook and killed him. The jury assessed damages at \$2,500, and judgment was given for that amount by the trial Judge, and affirmed by the Divisional Court, it being held that there was some evidence of negligence which could not be withdrawn from the jury.

The appeal was heard by Moss, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

E. E. A. DuVernet and W. B. Raymond, for defendants.

G. S. Kerr, Hamilton, and G. C. Thomson, Hamilton, for plaintiff.

Moss, C.J.O.:— . . . The sole question is, whether there was evidence proper to be submitted to the jury on which they could reasonably find against defendants on the issues presented. One is not called upon to say whether, if he was one of the jury, or was trying the case without a jury, he would find against defendants on the whole evidence. There was a conflict of testimony upon some material points, and it would have been for the jury, if it had been submitted to them, to determine which account they would accept.

There was evidence to the effect that when the deceased turned on to the south track the car was from 50 to 60 feet behind him. If that were so, there was ample time to have allowed the motorman to stop the car or to properly trip the fender before reaching the deceased, unless the car was going at a very rapid pace. The car was moving in a westerly direction on the south track, contrary to the usual and well known practice, and it seems evident that the deceased was not alive to the fact.

that the car, the sounds of which he must have heard, was proceeding on the north track. The position, as described by some of the witnesses, was such as to call for the exercise of extra care and diligence on the part of the motor-man, for, even if the car was not moving at a very rapid pace, and it probably was not, yet it was moving faster than the deceased, and was fast gaining upon him. The motor-man testified that the deceased remained on the devil strip, where he was in safety, until the car was within 8 or 10 feet of him, when he suddenly turned on the track in front of the car, too late to permit of anything being done effectively, and in this he is to some extent supported by other testimony.

But the testimony supporting the other view could not have been withdrawn from the jury, whose province it would have been to decide between the conflict of statements.

Appeal dismissed with costs.

OSLER, J.A.:—I do not dissent; it would serve no purpose to do so. But I cannot say that I view the result with satisfaction.

MEREDITH, J.A., gave reasons in writing for the same conclusion: he cited *Brydges v. North London R. W. Co.*, L. R. 6 Q. B. 377, L. R. 1 H. L. 213; *King v. Toronto R. W. Co.*, ante 507.

GARROW and MACLAREN, JJ.A., concurred.

MACMAHON, J.

DECEMBER 26TH, 1906

WEEKLY COURT.

E. B. EDDY CO. v. RIDEAU LUMBER CO.

Contract—Lumbering Operations—Cleaning out Stream—Allowance for Proportion of Cost—Driving Timber—Breach of Contract—Construction of Contract—Impossibility of Performance—Failure to get Logs out—Measure of Damages—Destruction of Logs by Fire—Negligence—Nominal Damages—Interest—Costs—Claim and Counterclaim.

Appeal by defendants and cross-appeal by plaintiffs from report of local Master at Ottawa in an action referred to

him for trial. The reasons of the Master are reported ante 361.

G. F. Henderson, Ottawa, for defendants.

J. F. Orde, Ottawa, for plaintiffs.

MACMAHON, J.:—Plaintiffs' claim is for work and labour alleged to have been performed for defendants in clearing out a stream known as the Jean Baptiste creek, near Lake Temiskaming, and for moneys advanced in paying the wages and board of the men, etc., amounting to \$706.04, the particulars of which are set out in the statement of claim.

The defendants admitted all but the last three items in the particulars, amounting in the aggregate to \$292.67.

The learned Master allowed these three items, and finds there is due from the defendants to the plaintiffs \$706.04.

The defendants appeal against the Master's finding as to these items, alleging that, according to the oral contract entered into, it was intended that the cleaning of the Jean Baptiste creek was to be completed in the autumn of 1903, and they did not dispute their liability for the work done during that year, amounting to \$515.37, but for the work done in the spring of 1904, for which plaintiffs claimed \$292.67.

The Master in his reasons for judgment says that the cleaning out was not completed in the autumn of 1903, and that over a considerable part of the stream no work whatever was done during that autumn, when operations had to be suspended because of the cold weather; that the cleaning out was completed in the following spring, without which no driving of timber could have been done on the stream.

The great weight of evidence is that defendants' agent agreed to pay "their share" for the work done, and that the "cleaning out" was not to be confined to what could be done during the autumn of 1903.

Defendants' appeal as to the three items mentioned fails, and must be dismissed with costs.

Defendants by paragraphs 13 and 14 of their counter-claim allege that they agreed to drive certain logs and timber belonging to plaintiffs on the stream known as Hudson's creek, for which plaintiffs agreed to pay the actual

ants allege they performed at the actual cost to them of \$1,106.70.

By consent defendants were allowed the sum of \$214.20 for this work.

All the above causes of action arose out of oral agreements entered into by the agents of plaintiffs and defendants.

By an agreement in writing, dated 18th March, 1904 (clause 2), defendants on their part agreed to drive, sweep, out, and boom out, at the mouth of the Wabis creek, all the certain logs and timber which were the property of plaintiffs, and plaintiffs on their part agreed to drive and sweep certain logs and timber, the property of defendants, in or on the banks of Jean Baptiste river and Blanche river; and that each of the parties thereto should "dump" into their respective streams the logs and timber belonging to the other party on the bank of such stream, and should be paid for so doing the usual or customary price for dumping logs and timber similarly situated.

"3. It is further agreed by and between the said companies that all timber or logs on the banks of the said rivers or creeks, to be driven as aforesaid, and which is not dumped into the waters of said rivers and creeks when required so to be for that purpose, shall be dumped by that company hereby required to drive same, and a proper statement, shewing what logs and timber, if any, were so dumped, furnished forthwith to the company owning same, and such last mentioned company shall be liable for the usual sum paid for dumping logs and timber similarly situated, and pay to the company dumping same said sum or sums, if any, on demand.

"5. And it is further agreed that each of the said companies, their successors and assigns, shall make every reasonable effort under the circumstances to fulfil their respective parts of this agreement during the driving season of this year, and if at any time either company fail to do so, the other company may give notice thereof in writing to such company offending, and in case such demand is reasonable and not complied with by a time to be specified for that purpose by the company giving notice, such last mentioned company may perform such service itself at the expense and cost of the company so in default."

respective parties agree in saying that clause 5 was inserted by the solicitor who prepared the agreement, without specific instructions from them, and that owing to the extreme shortness of the driving season the portion of it relating to notice of default, etc., was altogether unworkable."

The defendant company performed all the provisions of their written contract of 18th March by driving and sweeping all plaintiffs' logs and timber on the Wabis creek.

Defendants' counterclaim (paragraphs 3 and 4) sets up that by reason of the failure of plaintiffs to perform the terms of their contract as aforesaid—to drive and sweep all the logs and timber of defendants placed in or on the banks of the Jean Baptiste and Blanche rivers,—3,000 pieces of timber purchased by defendants from C. McNaughton were left on the banks of the Jean Baptiste river, and it became impossible to bring the same down the said stream during the season of 1904; and during the summer of 1904 the said 3,000 pieces of timber were destroyed by fire, and defendants suffered loss to the extent of \$1,590.

"6 and 7. That by reason of the failure of plaintiffs to perform their contract, 650 pieces of timber purchased from Stallwood & Gunn were left on the banks of the Jean Baptiste river, and it became impossible to bring the said timber down the said stream during the season of 1904, and during the summer of 1904 the said timber was destroyed by fire, and the defendants' loss thereby is \$176.67.

"9. By reason of the failure of plaintiffs to perform their contract, a further large quantity of timber belonging to defendants, consisting of 6,500 pieces, containing 826,201 feet board measure, was left along the banks of the said streams, and could not be brought down until the following season of 1905, which was brought down by defendants at the cost to them of \$409.97."

The Master finds that there is due to the defendants by the plaintiffs, in respect to the failure to drive and sweep the logs and timber referred to in paragraph 9 of the counterclaim (the grounds on which he based his findings being fully set out in his reasons for judgment), the sum of \$516.37, made up as follows:—

logs in the year 1905, which the plaintiffs failed to bring down in the year 1904, being a proportionate part of the sum of \$1,000 expended by the defendants in bringing down 31,667 logs, of which the 6,500 in question formed part	\$291 37
"One year's interest on the value of the logs at the rate of 6 per cent.	225 00
Total	<hr/> \$516 37"

I fully concur in the finding made by the Master, and the plaintiffs' appeal is dismissed with costs.

Deducting the \$706.04 allowed plaintiffs from the two sums of \$214.20 and \$516.37 allowed defendants, the Master finds there is due from plaintiffs to defendants a balance of \$24.53.

Plaintiffs are awarded the costs of the action, and defendants the costs of the counterclaim.

The Master also finds that defendants are entitled only to nominal damages for the failure of plaintiffs to drive and sweep the logs and timber known as the McNaughton and the Stallwood & Gunn logs, referred to in paragraphs 3 and 4 and 6 and 7 of defendants' counterclaim,—which logs and timber were left on the banks of the Blanche and Jean Baptiste rivers, and were destroyed by fire during the summer of 1904, before they could be brought down by the defendants.

The defendants appeal from the findings of the Master on the above paragraphs of the counterclaim.

[The Judge then quoted the Master's reasons for judgment, ante pp. 364, 365, 366.]

I agree with the learned Master in thinking that in the face of his finding "that there was plenty of water in the rivers all summer," and "that fires are of common occurrence in that country and the danger from them is a constant menace to shanties and to timber left behind in the spring," it would be most unfortunate if the defendants should be held not entitled to recover as damages the value of the Stallwood & Gunn logs and timber destroyed by fire. And I think, having regard to the rule laid down by the Court of Appeal in *McMahon v. Field*, 7 Q. B. D. 591,

and to other cases to which I shall presently refer, that they are entitled to recover as damages the value of the Stallwood & Gunn timber. . . .

[Reference to *Godkin v. Monaghan*, 83 Fed. R. 116; *Robson v. Mississippi Logging Co.*, 61 Fed. R. 900; *Railroad Co. v. Hoyt*, 149 U.S. 14; *McMahon v. Field*, 7 Q. B. D. 591; *Lilley v. Doubleday*, 7 Q. B. D. 510; *Parmalee v. Wilks*, 10 Barb. (N.Y.) 339; Story on Agency, sec. 218.]

The loss to defendants in the present case was caused by plaintiffs' negligence and breach of contract in leaving the logs on the bank of the stream, when they could have been easily driven to its mouth and delivered to defendants. The negligence, then, was the occasion, though not strictly the cause, of the loss; and the loss may be fairly attributed to it. Or, to use the language of Brett and Cotton, L.JJ., in *McMahon v. Field*, the damage to defendants "is such as is the natural and probable result of the breach of contract."

The defendants cannot recover in respect of the burning of what is known as the McNaughton logs and timber, as their servant set out the fire by which those were destroyed, and the defendants' appeal as to those fails.

But, for the reasons stated, the appeal against the Master's report as to the Stallwood & Gunn logs and timber must be allowed, and there will be a reference back to him to assess the damages to which defendants are entitled in respect to the destruction of those logs and timber.

Defendants are entitled to the costs of the appeal and of the reference back arising out of the 6th and 7th paragraphs of their counterclaim.

There will be no costs of the appeal as to the McNaughton logs.

TEETZEL, J.

DECEMBER 26TH, 1906.

TRIAL.

ELGIE v. EDGAR.

Equitable Assignment—Fund in Hands of Chattel Mortgagees—Written Order by Mortgagor—Mistake as to Balance Due—Assignment by Mortgagees—Rival Claimants of Fund—Interpleader Application—Dismissal—Subsequent Interpleader Action—Disposal of Fund—Costs.

Interpleader action, tried without a jury at Toronto.

C. J. Holman, K.C., for defendant Clemens.

F. E. Hodgins, K.C., and T. E. Godson, Bracebridge,
for defendant Edgar.

TEETZEL, J.:—Many of the difficulties and misunderstandings in this case are traceable to the omission of plaintiffs to credit Sieling with the two car-loads of lumber shipped by him on 2nd February and 5th March, 1906, respectively, as they were stripped, the value of the two being \$306.56.

This was followed by plaintiffs omitting to take them into account in the statement of 28th March made by plaintiffs to defendant Clemens, in which they shewed the balance due them by Sieling on his mortgage to be \$796.70, while in fact it should have been \$360.56 less than that sum.

On the faith of \$796.70 being the correct balance, Clemens purchased the property from Sieling, the consideration in the bill of sale being expressed to be "\$300 and the payment of a chattel mortgage to Elgie and Jarvis Lumber Company, on which there is now due and payable the sum of \$796.70."

One question for decision is, whether the \$306.56 should be paid to defendant Edgar by virtue of the order of 15th February, 1906, given to him by Sieling on plaintiffs for \$400, which was not accepted by plaintiffs except in a letter of 10th March in these words: "We are not yet paid, ourselves, on Mr. Sieling's account. However, we will apply the surplus on account of this order as soon as we clean ourselves;" or whether it belongs to Clemens by virtue of his purchase of 2nd April without notice of the \$400 order.

Clemens claims the benefit of all errors and omissions in the statement of the mortgage account furnished by plaintiffs as mortgagees.

Whether under the bill of sale and assignment to Clemens this position is well founded as between Sieling and Clemens, notwithstanding that there was a mutual mistake as to the amount due under the mortgage, I need not decide; but I think it cannot prevail as against Edgar by reason of his prior order filed with plaintiffs.

was owing under his mortgage to plaintiffs, and after paying that sum had then refused to ship more lumber to plaintiffs, the unappropriated \$306.56 in plaintiffs' hands would clearly be surplus and subject to Edgar's order. This amount, not having been applied on the mortgage, and the balance represented to be owing thereon having been assumed and paid by Clemens as part of the purchase price. I think, as against Clemens, it must be treated as surplus in the hands of plaintiffs, to which the order would attach.

Under the facts here, the order was in respect of a fund which might arise in the ordinary course of events in favour of the prospective creditor (Sieling) under an existing arrangement between him and the prospective debtors (plaintiffs), and which fund did in fact arise.

The three parties expected that there would be a fund to which the order might attach, and to which all intended it would attach if it should come into existence.

These facts, I think, distinguish this case from *Thomson v. Huggins*, 23 A. R. 191, *Hall v. Prittie*, 17 A. R. 306, and *Brown v. Johnson*, 12 A. R. 190, cited by Mr. Holman, and bring it more within *Lane v. Dungannon Driving Park Association*, 22 O. R. 264, and enable me to find that there was an equitable assignment to Edgar covering the \$306.56.

Defendant Edgar endeavoured to establish against the plaintiffs a personal liability for the \$400 quite independently of whether there was in fact a surplus in plaintiffs' hands, but I think he has completely failed in this.

Defendant Edgar having claimed the \$400, and defendant Clemens the whole \$730.44, plaintiffs applied to the Master in Chambers for an interpleader order, which was refused, and the Master's order was affirmed in appeal. (See ante 33, 299.)

Both defendants have pleaded that the disposition of the interpleader application is an estoppel to plaintiffs in this action on the ground of *res judicata*. I am of opinion that this defence cannot prevail as to the \$306.56, now a common fund in dispute, inasmuch as upon that application the material did not disclose the facts relating to the two items making up the \$306.56. These facts only became known to defendants upon plaintiffs' examination for discovery shortly before the trial.

ment should be entered declaring that of that sum defendant Edgar is entitled to \$306.56, and defendant Clemens to the balance.

The costs of trial might have been avoided if upon discovery of the facts the parties had agreed to this division. but defendant Edgar continued to claim the whole \$400 on the ground of plaintiffs' personal liability therefor, and defendant Clemens also continued to claim the whole \$730.44 as passing to him under his purchase from Sieling.

Defendant Edgar having failed to establish personal liability for \$400, and having only succeeded in recovering anything by reason of plaintiffs' mistake in omitting to credit the \$306.56 on Sieling's mortgage when they furnished the statement to Clemens, and the latter having claimed and failed to establish his right to this sum, I do not think either of the defendants should be awarded costs.

On the other hand, the act of plaintiffs, both on the interpleader application and in their statement of claim, in not disclosing the particulars as to the two car-loads of lumber, coupled with their failure to credit the proceeds thereof on Sieling's mortgage in the statement to Clemens, is sufficient, I think, to deprive them of their costs of this action.

Judgment accordingly.

Leave is given to each party, if desired, to appeal against this judgment respecting costs.

CARTWRIGHT. MASTER.

DECEMBER 27TH, 1906.

CHAMBERS.

JORDAN v. MACDONELL.

Venue—Motion to Change—Convenience—Witnesses—Affidavit—Solicitor.

Motion by defendant to change venue from Ottawa to North Bay.

J. E. Jones, for defendant.

J. R. Code, for plaintiff.

last, seeing in respect of the death of plaintiff's husband on 6th July. The statement of claim was not delivered until 10th October and statement of defence on 22nd October.

The husband was killed while a passenger on defendant's train; and negligence is charged in the operation of the train in question, as well as defects in the brakes and couplings, and in using too many cars for the motive power employed, so that the train broke into two parts, and the rear part ran down grade and caused the collision which led to the husband's death. The defendant says that plaintiff's husband was killed through his own negligence in being on the platform of the carriage; that he was a trespasser, and had not paid any fare. Defendant also denies that the breaks or couplings were defective or that the appliances were defective.

The venue was laid at Ottawa, as plaintiff resides at Carleton Place, and notice of trial for the Ottawa assizes beginning on 7th January next was given on 25th October.

On 20th December defendant gave notice of this motion.

All the undisputed facts of the case point to North Bay as the natural place for the trial. All the evidence on the points in controversy must be near North Bay, so that, in the words of Osler, J.A., in *McDonald v. Park*, 2 O. W. R. 972, "this is eminently a case for trial at" North Bay. This is confirmed by the material. Defendant swears to at least 15 witnesses who all reside at or near New Liskeard, which is 113 miles from North Bay, the latter place being 337 miles from Ottawa. This, it is said, would involve an extra cost of at least \$220. Plaintiff's solicitor makes the only affidavit in answer. I have several times pointed out that such an affidavit in strictness cannot be received. Even if it could, it only speaks of 3 witnesses resident in Carleton Place and of one at New Liskeard. No intimation is given of what these 3 can prove. This leaves 16 witnesses at New Liskeard as against 3 at or near Ottawa, which establishes the necessary preponderance, and brings the case within the principle of *Hamilton v. Hodge*, ante 351.

plaintiff's own delay had prevented the action being tried at the last jury sittings at North Bay, so that, if that is the proper place, there will not be any delay which can properly be charged to defendant.

If defendant will provide free transportation to plaintiff and one witness from Carleton Place, I think the order should go.

Costs in the cause.

BRITTON, J.

DECEMBER 27TH. 1906.

TRIAL.

ROBINSON v. ÆTNA INS. CO.

Interest—Assignment of Insurance Policy in Trust to Secure Debt and Future Premiums—Contract for Payment of Interest—Construction—Rate and Mode of Computing Interest—Interest Act—Application—Statute of Limitations—Trustee—Costs—Subrogation—Counsel Fees—Question between Defendants.

Action by a creditor of John Canavan, deceased, for a declaration that the proceeds of a policy of insurance issued by defendant company on his life were available for payment of plaintiff's claim and claims of other creditors, etc., and for further relief.

At the close of the trial BRITTON, J., found: (1) that the policy of insurance in question was not effected and premiums were not paid with intent to defraud plaintiff or the creditors of John Canavan, deceased; (2) that the assignment of the policy to defendant McBride was not fraudulent; and (3) that there was no assignment by defendant John Canavan the younger, or by defendant Minnie Canavan, of his or her interest in the policy to plaintiff; and gave judgment dismissing the action with costs.

The defendants Minnie Canavan and John Canavan the younger by their statement of defence asked that, as between them and defendants McBride and Duff, all proper

the amount which defendants McBride and Duff might be entitled to under and by virtue of a certain trust instrument dated 1st March, 1894; and defendants McBride and Duff asked that their rights should be determined *inter se*.

The questions so arising were argued after the dismissal of the action.

W. T. J. Lee, for defendants Minnie Canavan and John Canavan the younger.

W. J. Tremear, for defendants Thomas Duff, the creditor, and James McBride, trustee.

BRITTON, J.:—The instrument called the assignment and agreement of 1st March, 1894, was carefully drawn, and seems to have been fully understood. The terms of it, according to the plain, ordinary reading of the instrument, are hardly capable of being misunderstood, and must prevail unless there is some legal difficulty in the way, and I see none, unless upon the one point, viz., compounding interest half-yearly after 1st March, 1896, on the debt due to Duff.

All the defendants except the insurance company are parties to the agreement, in which the object is clearly set out by way of recital and otherwise. The intention was to secure the indebtedness of John Canavan to Duff, and to provide for payment of future premiums to keep the policy alive. The debt of John Canavan to Duff was fixed at \$1,296.92 as of 1st March, 1894, and, in consideration of Duff giving time for payment of that debt, those interested in the policy assigned it to McBride as trustee for the purposes therein mentioned. The time given was two years: payment to be made in 4 half-yearly instalments; so the whole amount became due on 1st March, 1896.

The trustee had the right to assign and pledge the policy, but not prior to 1st March, 1896, to the amount of the indebtedness and interest and premiums paid and interest on such debt and premiums, computed at 6 per cent. per annum, and compounded half-yearly with rests, but the policy was not pledged by the trustee, so it is not necessary to consider what the pledgee or assignee could have done.

held in trust "to pay and satisfy the indebtedness of the said John Canavan to said party of the third part (Duff), together with interest thereon, at the rate of 6 per cent., computed half-yearly with rests, to repay the said party of the third part any and every premium or premiums on said policy which it may be necessary or which the said party of the third part may see fit to pay in order to keep . . . the same in force, together with interest thereon at the rate of 6 per cent. per annum, computed from date or dates of payment of premium or premiums, compounded half-yearly with rests, and to pay and satisfy the costs and expenses of the said party of the third part and of the said party of the second part (McBride) in any wise in connection with the carrying out of these presents . . . it being understood and agreed that in any dealings or in taking of any steps or in the drawing of any amounts the party of the second part shall be entitled to receive the usual fees and charges as solicitor (notwithstanding the fact that he is acting as trustee) as though he were not a trustee but acting simply as solicitor for the parties hereto."

Then there is the power to pledge after 1st March, 1896, repeated in the instrument.

I am of opinion that upon the debt to Duff the interest should be computed at 6 per cent. per annum and compounded half-yearly with rests for two years, viz., until 1st March, 1896, and then only interest on the amount of debt and interest due on that day from that day to the date of payment of the money by the Ætna Insurance Company. In so deciding, I think I am within the principle of the cases *Goodchap v. Roberts*, 14 Ch. D. 49; *Archbold v. Building and Loan Association*, 15 O. R. 237; *Powell v. Peck*, 15 A. R. 138.

Upon the premiums paid, the trustee and creditor should be allowed interest at 6 per cent. per annum from date of payment of such premiums, compounded half-yearly down to date of payment by the insurance company.

The Act to amend the Acts respecting interest, 63 & 64 Vict. ch. 29 (D.), expressly provides that it shall not apply to "liabilities" existing at the time of its passing. The money secured by the policy in question was subject to the liability created on 1st March, 1894. In my opinion,

the recovery of interest cannot be limited to the 6 years next before the death of the insured. The Statute of Limitations has no application to this case. The trustee is not bringing any action. He has a right to the money; for the purposes of this inquiry it is money in his hands impressed with a trust.

As to costs, the trustee is entitled under the agreement, and it seems to me that he is fully protected if he gets, as he is entitled to get as solicitor, pay for all the work he has done or may do in executing the trust.

If the costs of defence of the trustee and creditor are not recoverable from the plaintiff, against whom the action was dismissed with costs, then these costs should be paid out of the insurance money, and deducted therefrom before payment to Minnie Canavan and John Canavan the younger of the balance. In that event defendants Minnie Canavan and John Canavan the younger must be subrogated to the right of the trustee and creditor to recover against plaintiff.

The argument in this matter must be considered as part of the counsel work at the trial, and no separate costs as of a new motion to any party to be allowed.

DECEMBER 27TH. 1906.

DIVISIONAL COURT.

AVERY v. FORTUNE.

Way—Private Right of Way—Prescription—User for 40 Years—Interruption—Evidence—Fresh Evidence on Appeal—Costs.

Appeal by defendant from judgment of CLUTE, J., at the trial, in favour of plaintiff for an injunction and \$5 damages in an action for trespass to land, defendant asserting a right of way.

J. A. Hutcheson, K.C., for defendant.

H. A. Stewart, Brockville, for plaintiff.

The judgment of the Court (FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.), was delivered by

of plaintiff, being part of lot 24 in the 5th concession of the township of Escott. . . . On the appeal troublesome questions as to pleading arose, and further evidence was said to be available, so that, with the consent of both parties, we ordered the appeal to stand over, the pleadings to be amended, and either party to be at liberty to adduce such evidence as he saw fit before my brother Britton at the then approaching non-jury sittings at Brockville. We also directed an examination de bene esse of an aged witness. This has been done, and we are now able to dispose of the case.

The subsequent evidence given being of a very cogent character, it is important to know how far it is to be believed. My brother Britton says that he believes the evidence taken before him on behalf of defendant. As regards the evidence taken de bene esse, we must treat that in the ordinary way and test it, if it becomes necessary, by the ordinary methods.

The evidence thus adduced would probably, had it been before him, have modified the opinion of Clute, J. I am not sure, had the evidence remained as it was before him, that I should not have come to the same conclusion as he did. However that may be, as the case now stands, I think the facts are as follows:

Plaintiff's land is the south-east quarter and defendant's the south-west quarter of lot 24 in concession 5 of Escott. As far back as 1805, Peter June, the father of the witness Mrs. Asselstine, became the owner of both portions of land, and in 1821 he sold the south-west quarter to his brother John Fairchild June, who in 1827 sold it to Duncan De Wolfe. John F. June moved into the homestead about the time he bought. During the time that John F. June occupied the house, he used the way in dispute in this action to pass to the highway to the east of him. This was on the land of Peter June, and John F. June had no other way of getting out to the highway. The use of the way in question, then, began about 1826, or probably a few years before, and was open, peaceable, and certain, *nec clam, nec vi, nec precario*.

De Wolfe used it in the same way, as did his successor in title, the father of defendant, who acquired the land in

after Isaac Avery became the owner. Isaac Avery is the predecessor in title of plaintiff.

During the greater part, if not all, of this time, the predecessor in title of defendant kept bars at the line fence between the south-east and the south-west quarters of the lot, and also at the east end of the way at the highway. The way had well-defined and fixed locus a quo and locus ad quem, and was thoroughly well-defined throughout, although not fenced.

Isaac Avery, about 1855 or 1856, in a conversation with the father of the witness Scott, speaking of the then owner of the south-west quarter letting the bars down and so allowing his (Avery's) cows to get out on the highway, and being asked why he did not close up this way, said, "It has been there too long." On being asked how long, he said, "It was there when I bought my place."

Again, "somewheres between 45 and 50 years ago," say about 1860, Isaac Avery, in a conversation with the father of the witness Andrews, said that Fortune (the then owner of the south-west quarter) was hounding him that he might get that piece of land north of this way across his (Avery's) lot; and, as the witness puts it, "He (Avery) says, 'I told him that he hadn't money enough to buy it, and at any rate he didn't need it, for he had the right of way.'"

This evidence, cogent as it is, and believed as it is by the Judge who saw the last two witnesses, was not before Clute, J.

No interruption of this use of the way is pretended until about 36 or 37 years ago, say 1869 or 1870, or . . . 1868. By this time there had been an actual enjoyment without interruption by persons claiming as of right for more than 40 years. The statute then in force was C. S. U. C. ch. 88, sec. 37, which is totidem verbis R. S. O. 1897, ch. 133, sec. 35.

Any interruption that did take place was, I think, in any case an interruption, simply, of the use of the way without keeping up the bars, and it did not continue more than a few months, certainly not one year: C. S. U. C. ch. 88, sec. 39.

or the necessity of considering the question of a prior permission given orally: C. S. U. C. ch. 88, sec. 37; but I do not find anything to indicate or prove any permission given from time to time or at any time.

Even had the enjoyment been for the shorter period of 20 years only, I think there is nothing in the case, as it now appears, to prevent defendant from succeeding. The trial Judge inclined to the opinion that there was sufficient evidence of user after the death of Isaac Avery, and, as I understand the judgment, he would have found for defendant, had he not been of the opinion that the statute was not running during the lifetime of Isaac Avery. I agree with him in the former opinion, but disagree as to the latter, for the reasons stated.

Defendant is at fault in not having his evidence at the trial in the first instance, plaintiff in not having his pleading in proper form—on the appeal before us both parties asked to have the case opened. A proper order to make as to costs is, that defendant will have the general costs of the action, that there will be no costs of the proceedings before Clute, J., or of the appeal to us in the first instance, that the costs of the proceedings before Britton, J., and of the final appeal to us, will be to defendant.

Defendant submitting, the judgment will contain a clause that the right is subject to his keeping up bars or gates at the two ends of the piece of land over which the right of way is claimed.

MOSS, C.J.O.

DECEMBER 27TH, 1906.

C.A.-CHAMBERS.

VIVIEN v. KEHOE.

Appeal to Court of Appeal—Leave to Appeal from Order of Divisional Court Reversing Judgment at Trial—Small Amount Involved — No Special Circumstances — Leave Refused.

Motion by plaintiff for leave to appeal to the Court of Appeal from order of a Divisional Court (16th November.

T. D. Delamere, K.C., for plaintiff.

W. E. Middleton, for defendant.

Moss, C.J.O.:—Viewed in whatever light it may be, the action involves nothing more than the liability of plaintiff to pay a sum of \$435 or \$436 to defendant. The action is in form for the specific performance of two several agreements for the sale to and purchase by plaintiff of some parcels of lands, but there is no dispute as to the making of the agreements or their terms or as to the title to the lands. The sole question is whether plaintiff has paid the full amount of the purchase money, upon payment of which it is conceded that he is entitled to a conveyance from defendant.

The title is vested in defendant, but he holds for a syndicate composed of himself and two others named Byrne and Morin (the latter now deceased), they being interested in unequal shares. Morin acted for the syndicate in the collection of the purchase moneys, and was accountable to the others. This was known to plaintiff and all payments were made by him to Morin. Morin was indebted to plaintiff in the sum of \$1,000, and by arrangement between them the sum of \$435 or \$436 now in dispute was set off against Morin's indebtedness, but without the knowledge of the other members of the syndicate. In a statement rendered by Morin to defendant this sum appeared as having been received from plaintiff, and the question at the trial was whether, on the facts appearing, this was to be deemed a payment by plaintiff so as to entitle him to a declaration that he had paid the full amount of the purchase money.

The Divisional Court, differing from the trial Judge, determined that it was not.

There is nothing either in the facts or the law of a special or important nature. The sole ground urged in favour of a further appeal is the difference of opinion between the trial Judge and the Judges of the Divisional Court. The latter were unanimous, but their reasons have not been reported, judgment having been, it is said, de-

clusion appears to be one that might well be arrived at upon the evidence. It is certainly not so unsatisfactory as to furnish a reason, standing alone, for allowing a further appeal, and there are no other exceptional circumstances to support the application.

Motion refused with costs.

FALCONBRIDGE, C.J.

DECEMBER 28TH, 1906.

CHAMBERS.

REX v. FERGUSON.

Factories Act—Meaning of “Factory”—Application of Act to Tailor Shop—Sanitary Conveniences—Neglect to Provide—Duty of Owner of Building Leased for Shop—Duty of Lessee as Employer—Construction of Act—Conviction of Owner.

Case stated by the police magistrate for the city of St. Thomas, in the county of Elgin, under the provisions of sec. 900 of the Criminal Code.

1. On 1st February, 1906, an information was laid, under oath, before the magistrate, by James T. Burke, for that Frank H. Ferguson, being the alleged owner of a factory, known as No. 343 on the north side of Talbot street in the city of St. Thomas, did not on 31st January, 1906, and for 6 months previously, provide a sufficient number and description of privies, earth or water closets, and urinals for the employees of such factory, including separate sets for the use of male and female employees, and did not have separate approaches to the same, as required by the Ontario Factories Act, R. S. O. 1897 ch. 256, and amendments thereto, and that the said Frank H. Ferguson for 30 days prior to 31st January, 1906, refused and neglected to comply with the above requirements, after being notified in writing in regard to the same by the Factories' Inspector.

2. On 2nd February, 1906, the charge was heard before the magistrate, in the presence of both parties, and, after hearing the evidence adduced, he found that Frank H. Fer-

of Elgin, representing the Attorney-General for the province of Ontario, he stated this case for the opinion of the High Court.

The facts of the case and the reasons for the conclusion of law arrived at appear in the opinion of the magistrate, which forms part of this case. The Crown-Attorney, representing the Attorney-General for the province of Ontario, desiring to question the decision on the ground that it is erroneous in point of law, the question submitted for the judgment of the Court is:—

Whether Frank H. Ferguson, upon the facts found by the magistrate, should or should not have been convicted of the offence charged.

The following was the opinion of the magistrate:—

The defendant is the owner of a store on the north side of Talbot street in the city of St. Thomas, occupied by Messrs. Beal & Martin as his tenants. The lease under which they occupy the premises is in statutory form, and contains no restrictions upon the tenants as to the kind of business to be carried on by them. They have occupied the premises since 1st May, 1896, under the lease, and have during that time carried on the business of merchant tailors. The rear part of the building is used as a tailoring department, and the front part as a sales department. They have been employing upon an average 14 persons in the tailoring department, 6 males and 8 females. There is only one closet upon the premises, and that is in the basement of the store, and there is only one approach to it, and it is used in common by male and female employees of Beal & Martin. Section 15 (1) (a) of the Factories Act provides: "The owner of every factory shall provide a sufficient number and description of privies, earth or water closets, and urinals for the employees of such factory, including separate sets for the use of male and female employees, and shall have separate approaches to the same, the recognized standard being one closet for every 25 persons employed in the factory." The inspector of factories laid an information against the defendant for non-compliance with the foregoing section of the Factories Act.

by the Act, and that he refused to do anything.

Section 2 of the Factories Act provides as follows:—

“1. ‘Factory’ shall mean: (a) any building, workshop, structure, or premises of the description mentioned in schedule A to this Act, together with such other building, structure, or premises as the Lieutenant-Governor in council from time to time adds to the said schedule; and the Lieutenant-Governor in council may, from time to time, by proclamation published in the Ontario Gazette, add to or remove from the said schedule such description of premises as he deems necessary or proper.”

“(c) Any premises, building, workshop, structure, room, or place wherein the employer of the persons working there has the right of access and control, and in which, or within the precincts of which, any manual labour is exercised by way of trade or for purposes of gain in or incidental to the following purposes, or any of them, that is to say: the making of any article or part of any article; the altering, repairing, ornamenting, or finishing of any article; or the adapting for sale of any article.”

The Crown Attorney argued that the defendant came within one or the other of the above provisions, and that he ought to be convicted. I shall therefore consider clause (a) first. The clause refers to schedule A of the Act, and, unless the business carried on by Beal & Martin can be said to be a clothing factory, the defendant cannot be convicted under the authority of that clause. The word “factory” means the same thing as the word “manufactory,” and, in my opinion, a merchant tailor is not a manufacturer within the meaning of the Ontario Factories Act. A merchant tailor may be a manufacturer in the narrow sense of the word, but I do not think that is the meaning which ought to be given to it in construing the Factories Act. It should be construed in its popular sense, and construing the Act in that way, a manufacturer is a person who produces goods from a raw state by manual skill and labour, and goods which are commonly turned out of factories; and, in my judgment, a merchant tailor cannot be regarded as a manufacturer. He merely cuts and fashions a suit of clothes as

city as a manufacturing centre, or having factories within it, the ordinary understanding is that it has factories where articles of use are made in considerable quantities by the aid of many hands or of machinery, and generally to be supplied to retail dealers. Viewing the Act in this light, I do not think that tailor shops, or merchant tailors not engaged in wholesale trade, can be included among the factories and the manufacturers of a place.

The Crown Attorney also contended that the word "owner" in sec. 15 meant the legal owner of the building, but I do not agree in that. "Factory" is defined to mean any building, workshop, structure, or premises of the description mentioned in schedule A. If the business carried on in this case can be said to be a clothing factory, the defendant is not the owner of the factory—Beal & Martin are the owners.

I shall now consider clause (c). This clause may be sufficient to include a merchant tailor, but, even so, I do not think that it applies to the defendant by reason of the words contained in it, namely, the following words, "Wherein the employer of the persons working there has the right of access and control." The defendant is not the employer in this case. He has no right to go upon the premises except to view state of repair under the covenant in the lease giving him that right. If he were to go upon the premises except to view state of repair, he would be a trespasser; and, if the Factories Act imposes any duty upon him requiring him to make any alterations in or additions to the premises, there is nothing in the Act exempting him from liability; and, that being so, I do not think the legislature intended to include the legal owner of the building, who has no interest whatever in the business carried on by others. I may also add that the Factories Act imposes substantial penalties for violations of its provisions, and it ought for that reason to be construed strictly in favour of the accused, and in any case where it is doubtful whether a particular provision applies to a person charged with a violation of such provision, the person charged ought to be given the benefit of the doubt. For these and the other reasons which I have given, I think the defendant ought not to be convicted, and I, therefore, dismiss the charge.

a charge has been laid under the Act.

The stated case was heard by FALCONBRIDGE, C.J., in Chambers.

J. R. Cartwright, K.C., and A. McCrimmon, St. Thomas, for the Attorney-General and the Inspector of Factories.

J. B. Davidson, St. Thomas, for defendant.

FALCONBRIDGE, C.J.:—The facts appear in the case and in the judgment which is made part of the case.

With great respect I am unable to concur in the view taken by the learned magistrate on either branch of the case.

1. I am of the opinion that the premises in question are a "factory," as defined by the Factories Act, R. S. O. 1897 ch. 256 (as amended . . .), sec. 2, sub-sec. 1, clause (c). It is a "building . . . wherein the employer of the persons working there has the right of access and control, and in which . . . manual labour is exercised by way of trade . . . in or incidental to . . . the making of any article . . . or the adapting for sale of any article."

It is nihil ad rem for the purposes of the definition that the employer is not the person here charged.

2. Then I turn to sec. 15, which provides that the owner of every factory (a) shall provide a sufficient number . . . of privies, etc. . . . for the employees . . . including separate sets for the use of male and female employees . . . etc. . . . with separate approaches to the same . . . ; (b) shall be held responsible for effluvia arising from a drain, etc.; (c) shall arrange for a supply of pure drinking water.

This is plainly meant to apply to the owner of the building. These duties relate to the substantial, structural condition of the premises.

The duties imposed on the employer (who is defined by sec. 2, sub-sec. 3) relate to the domestic economy and interior management of the factory. By sec. 16, he is to (a) keep the factory in a clean and sanitary condition and free from effluvia arising from refuse. (Note here the sharp contrast, the landlord being as stated above liable for

privies, etc., in good repair, and shall be held responsible for keeping closets separated for male and female employees (the owner's duty being as stated before to provide them); (c) to regulate the temperature; (d) to ventilate the factory; (e) not to allow over-crowding; (f) the inspector may require him to provide spittoons, and so on.

Our legislation on the subject is therefore very precise, and the American cases cited, having regard to the statutes which they are said to interpret, are not in point.

I have also considered the case of *Toller v. Spiers & Pond*, 19 Times L. R. 119. I fancy that in the present case no serious opposition will be raised by the tenant if the landlord desires to enter on the premises in order to carry out the provisions of the law. Every one is supposed to know the law, and people have no right to enter into covenants or engagements which tend to put it out of their power to obey the law.

The preamble to the original Factories Act, 47 Viet. ch. 39, was: "Whereas special provision should be made for the safety, health, and well-being of operators employed in and about factories and like places within Ontario." I take it that "well-being" includes moral as well as physical well-being, and that it tends to the moral well-being of the 6 male and 8 female persons employed in this factory that the ordinary decencies and proprieties of life should be observed. Wherefore, if my opinion on the subject were not even so strong as it is, I should endeavour to see that this important duty should not be made a shuttle-cock between the "owner" and "employer." Doubtless the latter, if attacked, would produce arguments equally specious and perhaps better founded to shew why he should not be held answerable for breach of this particular duty, but it cannot be that it is the duty of no one to carry out this provision of the law.

The answer to the question will be that the respondent Frank H. Ferguson should have been convicted of the offence charged. The matter will therefore be remitted to the magistrate with this opinion, in order that he may deal with it according to law.

IREDALE v. LOUDON.

Limitation of Actions—Real Property Limitation Act—Title by Possession to Upper Storey of Building with outside Landing and Staircase—Declaratory Judgment—Refusal of—Injunction Restraining Defendants from Interfering with Possession of Portion of Building—Easement.

Action for a declaration that plaintiff was the owner in fee of "the workshop above the street" on the west side of Bay street, in the city of Toronto, known as street No. 186, together with the landing and staircase leading to the workshop, the same having a frontage of about 13 feet, 6 inches, on the west side of Bay street, commencing 63 feet, 11 inches, southerly from the south limit of Queen street, by a depth of about 53 feet running westerly from the westerly limit of Bay street, and for an injunction restraining defendants from entering upon these premises, and removing or damaging the buildings thereon, and from wrongfully interfering with the premises to the detriment of plaintiff.

Strachan Johnston and R. H. Parmenter, for plaintiff.

E. D. Armour, K.C., and W. D. McPherson, for defendants.

MABEE, J.:— . . . The building in question is a two-storey wooden structure, the only entrance to the upstairs portion being from a street door at the north-east corner, on Bay street; there is a small landing, the floor being on the ground, about 3 feet wide and 5 feet deep: from there the stairs go up to the portion of the building claimed by plaintiff. The street door is usually kept locked when the shop above, occupied by plaintiff, is closed; there is also a door at the top of the staircase: there is no excavation or basement.

Defendants are, and have for years been, in possession of the ground floor, except the landing at the foot of the staircase. Plaintiff has occupied the upper floor since

use the landing and staircase for access to and egress from the shop above.

Plaintiff has not since 1889 slept upon the premises; in the summer he usually closed up at midday on Saturdays, returning on Monday morning, and once in July, 1899, went to New York for 3 weeks, leaving his goods on the premises, intending to return, and putting his brother, one of the defendants, in charge for him during his absence. I mention these facts as it was contended by Mr. Armour that this prevented the statute running, particularly as to the absence in New York. I do not think so. There was no abandonment at any time, and I think plaintiff had actual, continuous, and peaceable possession, adverse to defendants, at least since October, 1890.

There was no period when defendants could not have taken proceedings to eject him: *Agency Co. v. Short*, 13 App. Cas. 783. This possession was well known to defendants, and in June, 1891, when leasing the adjoining premises, which defendants also owned, they included in that lease "the ground floor, as it now exists, of the shed or building immediately adjoining the said demised premises." This is the building in question, and at that time plaintiff was in possession of the upper floor.

I think the possession of plaintiff was sufficient to extinguish the title of defendants to the upper floor of this building, as well as the space of ground at the foot of the stairs, being 3 feet on Bay street and 5 feet deep. On 20th June, 1906, the solicitor for defendants notified plaintiff that he was forbidden to further use the passage-way leading to the stairs, and the stairs leading to the floors above, and also "that it is our intention as owners forthwith to remove the structure which supports that part of the building at present occupied by you." On 29th June, 1906, plaintiff was again notified that it was the intention of defendants to commence removal operations at any time after 6 p.m. on Tuesday 3rd July, whereupon plaintiff applied for and obtained an interim injunction restraining defendants from interfering with the building, and this was afterwards continued until the trial. While I think the possession of plaintiff has extinguished the title of defendants to the upper floor and landing at the foot of the

entitled to a declaration of ownership in fee of those portions of the premises.

The statute operates to extinguish the paper title of defendants, and to leave plaintiff, as against them, entitled to possession; it does not vest in plaintiff the title formerly held by defendants, and nothing appears in the statute under which the disseisor acquires anything. It has been said that the effect of the Act is to make a parliamentary conveyance of the land to the person in possession, after the statutory period has elapsed, but, though it is true that the possessory owner, after the statutory limit has been passed, is placed by the Act in a position analogous to that which he would have occupied if the fee simple had been absolutely conveyed to him, yet his title under the Act is acquired solely by the extinction of the right of the prior rightful owner, not by any statutory transfer of the estate: Dart, 7th ed., pp. 472, 473. . . .

[Reference to *Gray v. Richford*, 2 S. C. R. at p. 454; *Dart*, p. 471; *James v. Bonner*, 33 W. R. 64; *Scott v. Dixon*, 3 Dr. & War. 388; *Sands v. Thompson*, 22 Ch. D. 614; *Darby & Bosanquet*, 2nd ed., p. 493; *Dixon v. Gayfere*, 17 Beav. 421; *Tichbourne v. Weir*, 8 Times, L. R. 713.]

A declaratory judgment, however, rests in the sound discretion of the Court, and, while I think plaintiff has, by his possession, acquired title, I do not think it a proper case for the Court to make such a declaration as against the person whose title has been lost, and that the better course is to leave plaintiff where the statute leaves him. Nor is such a declaration necessary in this case; the real reason for bringing the action was the threat made by defendants to pull down the building, and, had that not been made, it is hardly conceivable that an action would have been brought for a declaration of title merely, and had such an action been instituted I cannot think it would have succeeded.

It was not contended for defendants that a grant could not be made of a room or rooms, part of a building, or that the title of an owner could not be extinguished by possession of a room or rooms for the statutory period, but Mr. Armour argued that, even had plaintiff the possession required by the statute, yet he had no right to restrain de-

storey, or support for it, as an easement, and the necessary time had not elapsed to enable plaintiff to set up such a right.

Plaintiff here is not in the same difficulty as was plaintiff in *McLaren v. Strachan*, 23 O. R. 120 n., as here plaintiff has a title by possession to a direct entrance from the street. In the view I take . . . plaintiff has a right, as against defendants, to the possession and enjoyment of the upper floor, staircase, and landing at the foot. Defendants' enjoyment of their portion of the building, therefore, must not interfere with the rights plaintiff has acquired against them; and it necessarily follows that defendants are not entitled to put into execution the threats contained in their letters to plaintiff.

Plaintiff, of course, has not acquired any easements against defendants, and counsel for plaintiff did not so contend, but he has acquired title to these premises, and to permit defendants to carry out the intention expressed in their letters would be an invasion of the rights so acquired, and something plaintiff is not bound to submit to.

In *Raines v. Buxton*, 49 L. J. Ch. 473, it was held that the plaintiff had acquired a good title under the statute to a cavity used by him as a cellar under the defendant's house. So why may a man not acquire title to the whole upper storey of defendants' house?

I think any act of defendants that interferes with the right of possession and enjoyment by plaintiff of the premises now occupied by him would be a trespass, and that he is entitled to enjoin defendants from changing, altering, pulling down, or in any way dealing with their portion of the building in question, in such a way that the possession, use, and enjoyment of the . . . upper floor, staircase, and landing occupied by him, is interfered with or prejudicially affected.

Plaintiff will have the general costs of the action, but must pay to defendants all costs relating to or occasioned by the claim which was abandoned.

PINKERTON v. TOWNSHIP OF GREENOCK.

Water and Watercourses—Overflow of River—Injury to Adjacent Lands—Bridge Constructed by Township Corporation—Effect of, in Damming Water back—Extraordinary Freshets—Employment of Competent Engineers—Non-liability of Corporation.

Action for damages for injuries to plaintiff's lands by flooding, caused as alleged by a bridge built by defendants.

W. M. Douglas, K.C., and A. R. Clute, for plaintiff.

A. G. MacKay, K.C., and D. Robertson, Walkerton, for defendants.

MACMAHON, J.:—Plaintiff is the owner of lots 1 and 2 in the village of Pinkerton, in the township of Greenock, containing about two acres, on which are erected a dwelling-house, grist mill, woollen mill, saw mill, and barn. . . .

The Teeswater river at this place is somewhat in the shape of a shoe, and plaintiff's two acres are bounded to the south and west by the river, and to the east by a pond, which is connected with the north bend of the river by three race-ways used for running the woollen, saw, and grist mills. . . . The whole of plaintiff's land is very flat, but the part fenced in as a garden has been raised by dressings of earth in places from 3 to 8 inches above the bed of the stream. Plaintiff said that the subsoil being gravel the water percolated through it from the river to the cellar of his house . . . which was more or less flooded every year.

At the south-east end of plaintiff's land there is a stone and timber dam across the Teeswater river, 90 feet long; and down the river 750 feet from the dam, and near the north-west corner of plaintiff's two acres, there was a stone and wooden bridge across the river, constructed about 45 years ago, which I find was 105 feet in length between the abutments, and supported in the centre by a wedge-shaped pier 18 or 20 feet in length and 10 to 12 feet wide at its

broad end, which had a water displacement of 18 feet 9 inches, so giving a clear space for the water flow under the bridge of 86 feet 3 inches.

In 1901 the township council concluded to erect a new bridge partly on the site of the old one, and James Warren, an engineer, was engaged by the council, and prepared plans and specifications for a bridge 90 feet in length, and having inside of the abutments a clear span at water level of 85 feet 6 inches, and being between 7 and 8 feet high above the ordinary water level in the river. The abutments were of stone, supporting steel or iron girders. In the autumn of 1901 the abutments were completed, but the pier had to remain for a time, as the floor of the old bridge had to be utilized until the steel superstructure was ready to be placed in position, which was in 1902.

Plaintiff in his statement of claim alleges:—

"8. The defendants caused the abutment of the new bridge on the east bank to be extended into the channel or bed of the river 25 feet further than the abutment of the old timber bridge.

"9. The defendants in constructing the new bridge built a coffer dam and deposited in the river certain materials, parts of which dam the defendants have left in the river, and the flow of the water is thereby obstructed.

"10. The defendants have further obstructed the flow of the water in the river by allowing portions of the pier to remain in the channel, notwithstanding that said pier is not required or used in any way for the purposes of the new steel bridge.

"11. That by reason of the abutment of the new bridge being extended into the channel and by reason of the obstructions referred to, the channel is narrowed and obstructed, and the flow of water past plaintiff's lands was obstructed and impeded; and, as a consequence of such obstruction and penning back, his lands along the side of the river were in the spring of 1904 and 1905 flooded."

In 1895 plaintiff had complained to the township council that his property had been flooded in the spring freshets of that year, and stating that the west abutment extended too far into the stream, and he considered it an obstruction to the flow of the water, and asked for relief.

which may obstruct the free flow of the water within the road allowance and under the east span of the bridge as soon as Mr. Pinkerton removes the gravel obstructing the free flow of water on his property to the roadway and bridge in said plan." . . .

Plaintiff had forgotten all about his complaint to the council in 1895, although he said the water that year was flooding him more than formerly. A number of witnesses speak of there being an unusually heavy fall of snow during the winter of 1894-5, and that in the spring of the latter year the freshet was very high.

Mr. Warren, who prepared the plans and specifications for the new bridge, is an engineer of large experience, having designed between 20 and 30 bridges for various municipalities in the county of Bruce, and is spoken of as being a thoroughly competent engineer. He said that he knew the locality and made calculations as to the amount of water coming over the dam during the spring freshets, and concluded that the length of the new bridge was ample to allow that water to pass. He is corroborated as to that by Robert R. McDowall, a civil engineer also of large experience, having drawn plans and superintended the construction of a large number of bridges, and who was associated with Warren in the designing and preparation of the plans for the new bridge. The bridge cost \$2,300.

The township council considered the plans and specifications submitted and adopted them.

In building the new bridge, the engineer placed the western abutment 5 feet further west than the old one, and also placed the eastern abutment 25 feet further west. He (Warren) says the eastern abutment of the old bridge, though not in deep water, caused an obstruction to the flow of the water of 18 feet.

Mr. Fielding, an engineer called by plaintiff, took the levels along the banks of the Teeswater and through plaintiff's property, and these coincide almost exactly with the levels taken by Mr. McDowall, but there is a wide divergence between the calculations made by Mr. Fielding as to the quantity of water passing under the old bridge and flowing over the dam and the calculations made by Mr. McDowall and Mr. Warren. . . .

I consider the calculation made by McDowall and Warren as to the flow over the dam to be the more accurate. They make the flow under the new dam, based on an 86 feet 2 inches span between the abutments, 3,483 cubic feet per second.

Then as to the allegation in the 8th paragraph of the statement of claim, it is, I consider, clear that the new abutment did not extend into the channel of the river. . . .

As to the 9th paragraph, I find that the whole of the coffer dam was removed, except one stick of timber 12 feet long, which was the bottom stick of the coffer dam, and, as there was trouble from the old west abutment, the stick was left there close to the bottom of the new abutment to prevent its being undermined. It was only 2 or 3 inches above the bed of the river, and caused no perceptible obstruction to the flow of the water. The only other parts of the coffer dam left there were 3 or 4 boulder stones, 12 or 14 inches in diameter, beside or on the stick of timber.

As to the 10th paragraph. No portion of the pier was left in the river. John B. Campbell, in the autumn of 1902, removed all the timber from the pier to its lowest course. . . .

In the years 1882-3, 1894-5, 1903-4, and 1904-5, a large number of witnesses testify to there being very heavy snow storms, resulting in great floods along the Teeswater river during the spring of each of these years. . . .

The width of the river just below the dam is 106 feet, and 240 feet below the dam it is 75 feet wide, and 570 feet below it is only 60 feet in width, and at 50 feet from the bridge it is only 45 feet wide. There is a fall of nearly 5 feet between the foot of the dam and the bridge. With a torrent of water rushing over the dam during a freshet, and with the river 106 feet wide immediately below the dam and 31 feet narrower 240 feet below, and 46 feet narrower 570 feet below, one can easily understand with what rapidity the water would spread where the river banks were, hardly perceptible, and where a portion of the adjoining land belonging to plaintiff was but a few inches higher than the river.

cause of the alleged incapacity to carry the water during an ordinary spring freshet, caused it to back up on to his land and inundate it. But while the old bridge was in existence, and is represented as being adequate to carry off all the water that came over the dam, and had a capacity, according to Mr. Fielding, of 1,000 cubic feet per second in excess of what came over the dam, yet during the ordinary spring freshets each year the flats and part of plaintiff's orchard were flooded from the river. Plaintiff did not assert that these latter inundations were caused by the backing up of the river from the bridge, for the water, he said, entered on his land from the south-west of his house, and spread from the flats to the part of the orchard. . . .

The present bridge with a clear span of 85 feet 6 inches between the abutments has almost the same capacity as the old bridge of 105 feet between the abutments, but with a centre pier having a water displacement equal to 18 feet 9 inches, which would make a clear water way of 86 feet 3 inches. There is, therefore, a difference of only 9 inches in the water-carrying capacity of the two bridges.

I am satisfied from the evidence that during the freshets of 1904 and 1905 plaintiff's property was not flooded by the backing up of water from the new bridge; but that the water entered on his land from the south and west, and was flooded in that way. The snowfall preceding the flood of 1904 was the greatest in many years, and the freshet was of an unusual character; and the freshet of 1905 was unusual by reason of the quick melting of the snow, causing the Teeswater river and its tributaries to fill up with extraordinary rapidity. Against these unusual contingencies defendants were not called upon to provide: *Dixon v. Burnham*, 14 Gr. 594.

As Mr. Warren is an engineer of experience and as he had associated with him in preparing the plans, etc., Mr. McDowall, also an engineer of large experience (having prepared the plans and superintended the construction of 25 bridges varying in cost from \$1,200 to \$25,000), and as the plans and specifications had been submitted to the council and approved of by them, that alone would have been sufficient to free defendants from liability: *Hill v.*

Principal Negligence, p. 187. But I thought it better for the satisfaction of both the parties that I should make my findings on the evidence as it presented itself to me.

Mr. Douglas argued that the defendants could not claim exemption from liability although they employed a competent engineer, as they did not disclose to him that a complaint had been made by plaintiff in 1895, and his reasons therefor.

If there was no member of the council of 1895 who was a member in 1901, it is not surprising that the incident was overlooked, particularly when plaintiff, who was the party most interested, had altogether forgotten it. But there is another reason why it might not have been thought of. The council thought it would be useless, and therefore a waste of public money, to remove the gravel from under the east span of the bridge unless plaintiff agreed to remove the gravel obstructing the free flow of the water on his property to the roadway and bridge.

Adam Knox, the assessor for the township, thought the house and lot would sell for \$700.

I assess the damages contingently at \$300.

There will be judgment for defendants dismissing the action with costs.


DECEMBER 28TH, 1906.

DIVISIONAL COURT.

PAYNE v. MURPHY.

Contract—Sale of Logs—Action for Price—Subsequent Agreement—Finding of Trial Judge—Appeal—Costs—Discretion—Payment into Court.

Appeal by plaintiff from judgment of MABEE, J., at the trial, in so far as against plaintiff, in an action to recover a balance of \$516.57 alleged to be due under a contract for the sale by plaintiff and purchase by defendant of a supply



contract plaintiff agreed to pay a proportion of the cost of driving the logs down the Wahbe river, which proportion amounted to \$277.73. Defendant paid the difference, \$238.84, into Court. At the trial judgment was given for plaintiff for \$5 in addition to the amount paid into Court, but plaintiff was allowed costs only up to the time of the payment into Court.

The appeal was heard by FALCONBRIDGE, C.J.. BRITTON, J., CLUTE, J.

H. D. Gamble, for plaintiff.

R. McKay, for defendant.

FALCONBRIDGE, C.J.:—The judgment appealed from was delivered orally at the close of the argument, and it is contended for plaintiff that it contains no finding of fact as to the alleged subsequent agreement respecting the cost of driving the timber, but rests solely on defendant's supposed right in law to charge plaintiff with the cost of driving the logs, in the absence of any contract therefor.

I am not sure that the criticism is well-founded, because the trial Judge twice uses the phrase "I find upon the evidence," and this particular question of fact was the one most particularly in issue on the evidence.

We have consulted the Judge, and he says that he intended and intends to find the fact to be as stated by defendant, and that he thought he had done so.

Defendant is corroborated to some extent by the witness Edwards, and we should probably be justified in coming to the same conclusion, and we certainly could not ignore the opinion of the Judge who saw the witnesses.

The discussion, therefore, of what defendant's rights would otherwise be, becomes purely academic.

The motion to interfere with the trial Judge's disposition of the costs is entirely without merits. The award of \$5 depends on whether \$490 or \$495 was paid on account, and there is no very clear evidence as to which sum is correct, plaintiff's counsel having remarked . . .
"The \$5 is not here or there between us."

termine the question of costs as he did. *Henderson v. Bank of Hamilton*, 25 O. R. 641, was a very exceptional case in which the trial Judge himself thought proper to apply strictly the old practice where defendant failed to pay into Court a sufficient sum.

The appeal will be dismissed, but, in the peculiar circumstances of the case, without costs.

BRITTON, J., gave reasons in writing for the same conclusion.

CLUTE, J., concurred.

DECEMBER 28TH, 1906.

C.A.

RE SINCLAIR AND TOWN OF OWEN SOUND.

Municipal Corporations—Local Option By-law—Motion to Quash—Vote of Ratepayers—Town Divided into Wards—Right of Persons Owning Property in Different Wards to Vote more than once—Confusion from Colour of Ballot Papers—Persons Voting Without Right—Irregularities in Taking of Vote—Effect on Result—Municipal Act, sec. 204.

Appeal by William Henry Sinclair, the applicant in the Court below, from an order of a Divisional Court (ante 460, 12 O. L. R. 488), reversing an order pronounced by MABEE, J. (ante 239), quashing by-law number 1172 passed by the council of the town on 15th January, 1906.

The by-law was enacted under the local option provisions of R. S. O. 1897 ch. 245, known as the Liquor License Act, to prohibit the sale by retail of spirituous liquors within the municipality; and on 1st January, 1906, before it was finally passed by the council, it was submitted for the approval of the electors of the municipality as provided by sec. 141 of the Act.

The result of the polling as declared shewed a majority of 476 in favour of the by-law.

A number of objections were taken on the motion to quash, but the main one was that persons who were rate-payers in respect of property situate in different wards were not permitted to vote more than once on the by-law.

Effect was given to this objection by MABEE, J., but the Divisional Court were of the contrary opinion.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

W. Nesbitt, K.C., J. Haverson, K.C., and W. H. Wright, Owen Sound, for W. H. Sinclair, the appellant.

F. E. Hodgins, K.C., and J. W. Frost, Owen Sound, for the town corporation.

Moss, C.J.O.:—After carefully considering the grounds upon which the appeal was supported in argument, I find myself unable to adopt them.

The provisions of the Municipal Act, 1903, to which we are referred by sec. 141 of the Liquor License Act, are those comprised in secs. 338 to 375, inclusive, so far as the same are applicable.

If these sections only dealt with one species of by-law, a certain degree of support would be lent to the appellant's contention. But it is plain that there is a broad distinction made between expressing an opinion or voting on a by-law for contracting a debt and on other by-laws requiring the assent of the electors. Sections 338 to 352, inclusive, may be said to apply generally to all voting for the purpose of ascertaining the opinion of the electors on a by-law requiring their assent. By the incorporation of secs. 138 to 206, inclusive, a code of procedure is created for submitting the by-law to the electors, including the proceedings at the poll and for and incidental to the same and for the purposes thereof: sec. 351.

Looking at all these provisions, there is nowhere to be found any provision expressly enabling any elector to vote more than once except in the specified cases of aldermen or councillors, where in cities or towns the aldermen or councillors are elected for the wards, in which case every elector

rated in any ward for the necessary qualification may vote once in each ward for each alderman or councillor to be elected for the ward: sec. 158 (3).

And, throughout, the general common law rule of one vote where a poll is demanded is taken for granted. The very term "poll" implies the singular, for the poll is the numbering the polls of the electors who may tender their votes, taking their votes individually and separating them from those who have no votes: see Heywood's County Elections, p. 354. And at common law a freeholder could not poll twice at the same election for Knights of the Shire: see p. 425 et seq.

The appellant, however, places special reliance on sec. 355.

Sections 353 and 354 deal only with one class of by-law to be voted on, namely, that for contracting a debt. They deal with the qualification required in order to entitle a person to vote, and they provide that he or she must be a ratepayer (not an elector as in the preceding sections), and a freeholder, or a leaseholder for a term extending for the period of time within which the debt to be contracted or the money to be raised by the by-law is made payable, who has covenanted in his lease to pay all municipal taxes in respect of the property leased.

Sections 356 and 357 also deal with by-laws for contracting debts, and it is significant that in all these sections ratepayers are spoken of. The distinction between by-laws to be voted on by electors and by-laws to be voted on by ratepayers is further emphasized by sec. 365, which prevents the clerk of the municipality from giving a casting vote. The language used is, "where the assent of the electors or of the ratepayers or of a proportion of them is necessary to the validity of a by-law. . . ." The legislature has thus shewn that it had in mind the two classes of by-law, viz., those to be voted on by electors generally, and those to be voted on by ratepayers, a more limited class.

Turning then to sec. 355, we find that it speaks of ratepayers, and deals with their rights of voting. It is clearly not intended to regulate voting generally. If it were not in the Act, its absence would not prevent any elector from voting on a by-law. It says that certain electors, i.e., ratepayers, may under certain circumstances vote in more than

general or confined to a special class of by-law. The language, read, as it should be, in the light of the context, shews that the ratepayer spoken of there is the ratepayer referred to in the two preceding sections, and the case dealt with is that of voting on a by-law for contracting a debt, while its grouping with the sections immediately preceding and following shew that it was the intention to confine it to that case. So confining it does not interfere with the right of other electors to exercise their franchise in the manner and according to the other provisions of the Act in every case in respect of which they possess the necessary qualification. The section extends to one class of electors a special privilege to be exercised in a special case. The words "shall be so entitled to vote" indicate a voting under some particular or special circumstances. And these are ascertained by reference to the two preceding sections, which define the ratepayers who are entitled to vote on a by-law for contracting a debt. And I think that the fair interpretation to be put upon sec. 355 is that each ratepayer, as defined in the preceding sections, is to be entitled to vote, in respect of a by-law for contracting a debt as mentioned in the same sections, in each ward in which he has the qualification necessary to entitle him to vote on the by-law.

In this section we have the only other instance in which the right to vote more than once on any subject is expressly given by the Municipal Act. There are other instances in which, perhaps, the right may be given by implication by a provision enacting that a by-law is to be assented to by the electors in manner provided for in respect of by-laws for creating debts—or declaring that the persons entitled to vote thereon shall be the electors qualified to vote on by-laws for the creation of debts, e.g., secs. 19 (1), 28, and 565 (3).

When there are found instances where the right is expressly conferred, why should we infer an intention to recognize a similar right in all cases? Ought we not rather to infer that the general intent is against any such right, and that it exists only in the instances in which the legislature has said in terms that it may be exercised?

Stress was laid in argument on the language of sec. 348 as indicating an intention to give to all persons whose names are found in the voters' list to be supplied to the

I. F. Hellmuth, K.C., for plaintiffs.

G. H. Kilmer, for defendants.

Moss, C.J.O.:—Having read the evidence and the judgments delivered in this case, I am unable to say that it presents any exceptional or special circumstances justifying the allowance of a further appeal.

The facts are not in dispute. The conclusion drawn from them by the trial Judge was, not that the property sought to be rendered exigible under plaintiffs' judgment was the property of defendant Byron J. Hill, but that he had an interest in it as the outgrowth of what the trial Judge considered to be the investment by that defendant of \$300 in the business of the Hill Printing Co.

The Divisional Court found this conclusion not sustainable on the facts, and held, in effect, that the business was one carried on by defendant Mrs. Hill, in which her husband had no proprietary right. This finding might well be made on the evidence. The judgment at the trial expressly confined plaintiffs' remedy to the satisfaction of their judgment, amounting to about \$300 for debt and costs, out of defendant Byron J. Hill's supposed interest in the property. That is the amount directly in controversy in the appeal. It is said that plaintiffs hope or expect to recover judgment in a short time against Byron J. Hill for a large sum. But Mrs. Hill, the substantial defendant here, is not to be affected in her rights by any proceeding not now before the Court. In the eye of the law, though doubtless only in theory in this case, the interest of her husband appears to be with plaintiffs, for payment of their claims relieves him of his indebtedness. But his wife is entitled to insist that, in accordance with the policy of the legislature, the litigation shall be brought to an early conclusion unless some good and sufficient grounds for its further continuance as against her can be shewn. She has a unanimous decision of the Divisional Court in her favour, upon practically undisputed facts, which give rise to no difficult or important questions of law, and, in the absence of more special reasons than have been made to appear upon this application, she should not be subjected to a further appeal.

Motion refused with costs.

In my opinion, the Divisional Court came to the proper conclusion.

As to the other objections, the most formidable as presented in argument was the action of the clerk in inserting in the notice of the election a warning against voting more than once on the by-law. This is now answered by shewing that his view of the law was correct, and that, however unnecessary or outside the scope of his duty, the giving of the warning could not, and in fact did not, prevent any elector from giving one vote.

With regard to the other objections, I agree with the Divisional Court that an inspection of the respective ballot papers for voting on this and another by-law shews that there is nothing in the objection based on a supposed confusion by reason of the colours of the papers, and that, as respects the remaining objections, they are not sufficiently made out in some cases, and the remaining cases are not such as to affect the validity of the by-law.

The appeal should be dismissed.

OSLER and GARROW, J.J.A., gave reasons in writing for the same conclusion.

MACLAREN, J.A., also concurred.

MEREDITH, J.A., dissented, for reasons stated in writing.

MOSS, C.J.O.

DECEMBER 29TH. 1906.

C.A.—CHAMBERS.

HOGABOOM v. HILL.

Appeal to Court of Appeal—Leave to Appeal from Order of Divisional Court Reversing Judgment at Trial.

Motion by plaintiffs for leave to appeal to the Court of Appeal from order of a Divisional Court (ante 815) revers-

the action.

I. F. Hellmuth, K.C., for plaintiffs.

G. H. Kilmer, for defendants.

Moss, C.J.O.:—Having read the evidence and the judgments delivered in this case, I am unable to say that it presents any exceptional or special circumstances justifying the allowance of a further appeal.

The facts are not in dispute. The conclusion drawn from them by the trial Judge was, not that the property, sought to be rendered exigible under plaintiffs' judgment was the property of defendant Byron J. Hill, but that he had an interest in it as the outgrowth of what the trial Judge considered to be the investment by that defendant of \$300 in the business of the Hill Printing Co.

The Divisional Court found this conclusion not sustainable on the facts, and held, in effect, that the business was one carried on by defendant Mrs. Hill, in which her husband had no proprietary right. This finding might well be made on the evidence. The judgment at the trial expressly confined plaintiffs' remedy to the satisfaction of their judgment, amounting to about \$300 for debt and costs, out of defendant Byron J. Hill's supposed interest in the property. That is the amount directly in controversy in the appeal. It is said that plaintiffs hope or expect to recover judgment in a short time against Byron J. Hill for a large sum. But Mrs. Hill, the substantial defendant here, is not to be affected in her rights by any proceeding not now before the Court. In the eye of the law, though doubtless only in theory in this case, the interest of her husband appears to be with plaintiffs, for payment of their claims relieves him of his indebtedness. But his wife is entitled to insist that, in accordance with the policy of the legislature, the litigation shall be brought to an early conclusion unless some good and sufficient grounds for its further continuance as against her can be shewn. She has a unanimous decision of the Divisional Court in her favour, upon practically undisputed facts, which give rise to no difficult or important questions of law, and, in the absence of more special reasons than have been made to appear upon this application, she should not be subjected to a further appeal.

Motion refused with costs.

PRITTIE v. RICHARDSON.

*Principal and Agent—Agent's Commission on Sale of Land—
Purchaser Introduced by Third Person—Sub-agency of
Third Person—Evidence of.*

Appeal by plaintiff from judgment of MEREDITH, C.J., at the trial, dismissing without costs an action to recover commission on the sale of a hotel property by defendant to one Falconer. Plaintiff alleged that the property was brought to the notice of Falconer through the instrumentality of one Fawcett, who was Falconer's uncle, and plaintiff's agent, as plaintiff alleged.

John MacGregor, for plaintiff.

H. E. Rose, for defendant.

The judgment of the Court (MULOCK, C.J., ANGLIN, J., CLUTE, J.), was delivered by

CLUTE, J.:—Had credit been given to plaintiff's evidence by the trial Judge, sufficient would have been made out to entitle plaintiff to succeed, as it would have established the agency of Fawcett, under whose advice his nephew bought the property in question, after Fawcett had declined; but the trial Judge felt unable to accept plaintiff's evidence in this regard, and points out that in the examination *de bene esse* of Fawcett not one word of corroboration is found.

Plaintiff to be entitled to succeed must either shew that Fawcett was authorized to act as his agent, or that he assumed to act as his agent, and that he (plaintiff) ratified Fawcett's action. From the earliest times it has been established that no ratification is effectual unless the act has been done by the agent on behalf of the person who ratifies: Evans on Principal and Agent, 2nd ed., p. 64.

I have examined the evidence of Fawcett to ascertain whether anything can be found therein indicating the intention on his part to act as the agent of plaintiff in what took place between himself and his nephew. I can find no

defendant, and he looked over the place, and said to defendant that if he did not buy it himself he could perhaps induce his nephew, Falconer, to do so. Plaintiff was standing alongside of him at the time; a single statement would have settled the matter, but he nowhere hints that what he did or said was on behalf of plaintiff. He was asked: "Through whom did your nephew purchase the Richardson House?" A. "I do not know who he purchased it through, any more than I was the man who spoke to him first about it, and suggested to him that he should buy it, for he would have a good place, and there would be no danger of a cut-off." On cross-examination he does not mention that plaintiff was even present. He is asked: "Was there anybody else present with Mrs. Richardson?" A. "No, she just stayed in the office by herself." Falconer was asked: "Did you receive any communication from plaintiff in connection with this?" A. "No, I did not receive any personally." It seems that he saw a letter from plaintiff to Fawcett; but the letter was not produced, and no foundation was laid for secondary evidence. The result is that there is nothing that I can find which connects Fawcett with plaintiff as his agent, or that Fawcett assumed to act on behalf of plaintiff.

Plaintiff's counsel relied upon *Wilkinson v. Auston*, 48 L. J. N. S. Q. B. 733, and *Lincoln v. McClatchie*, 36 Conn. 136. A careful reading of *Wilkinson v. Auston* will shew. I think, that there is an essential difference between that case and the present. The continuity there was not broken. It could be in point if it could be shewn that in the present case Falconer had engaged Fawcett to act as his agent, and, acting as the agent of Falconer, Fawcett had purchased through plaintiff.

The trial Judge expressly found, and I think the evidence fully supports the finding, that Fawcett was not acting as plaintiff's agent in the communication that he made to Falconer, and that it was not even at plaintiff's request that Falconer was spoken to by Fawcett. That, in my opinion, entirely distinguishes the present case from the cases relied upon by plaintiff.

Appeal dismissed with costs.

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MARCH 28TH, 1906.

DIVISIONAL COURT.

RE CHURCH.

Executors and Administrators—Jurisdiction of Surrogate Court—63 Vict. ch. 17, sec. 18 (O.)—Compensation of Administrators Payable out of Portion of Estate—Trust Fund Set apart—Practice—Intituling of Order.

Appeal by the executors of Athole Church, deceased, from order of Judge of Surrogate Court of York directing that certain compensation to the administrators with the will annexed of the estate of Eliza J. E. Church should be borne by the estate of Athole Church, deceased.

Athole Church was the son of Eliza J. E. Church and one of the beneficiaries under her will. She died in 1902, and he in 1903, not having received his share of her estate.

The point raised by the appeal was whether a portion of the residuary estate could be charged specifically with the expenses of administering that portion, or whether those expenses should be borne by the whole estate.

J. A. Macintosh, for the executors of Athole Church.

W. B. Raymond, for the administrators of the estate of Eliza J. E. Church.

THE COURT (BOYD, C., MAGEE, J., MABEE, J.), held that the share of Athole Church, having been ascertained and set apart by the administrators, became a trust fund in their hands and ceased to be assets of the estate, and the expenses

eration of the general estate.

Re Smith, 42 Ch. D. 302, referred to.

It was also held that the order should be intituled "In the matter of the Eliza Jane Erskine Church Estate," with a sub-designation of the Athole Church trust, and that jurisdiction was given by 63 Vict. ch. 17, sec. 18 (O.), amending R. S. O. 1897 ch. 129, sec. 40.

The appeal was dismissed without costs.

FALCONBRIDGE, C.J.

DECEMBER 29TH, 1906.

CHAMBERS.

RE SYLVESTER MANUFACTURING CO. v. BROWN.

*Statutes—Retroactivity—6 Edw. VII. ch. 19, sec. 22 (O.)—
Procedure—Division Courts—Contract—Provision for
Determination of Forum for Possible Actions—Prohibition.*

Motion by defendant for prohibition to the 5th Division Court in the county of Victoria.

The plaintiffs brought this action in the 5th Division Court to recover an instalment of the purchase money of a machine sold to defendant. Defendant did not reside nor did the whole cause of action arise in the territory of the 5th Division Court, but by a clause in the contract of sale it was stipulated that any action arising thereout might be brought in that Division Court. The contract was made before the passing of sec. 22 of 6 Edw. VII. ch. 19 (O.), which enacts that "no proviso, condition, stipulation, agreement, or statement which provides for the place of trial of any action . . . shall, subject to the provisions hereinafter set out, be of any force or effect." And clause (1) is that "the provisions of this section shall not be available in any Division Court action or proceeding unless and until the defendant, within the time limited for disputing the plaintiff's claim . . . files . . . a notice disputing the jurisdiction of such Court and an affidavit of the defendant or his agent stating that in his belief there is a

ing the Division Court wherein (sic) the cause of the action arose, or partly arose, and the defendant resides."

The notice and affidavit were filed.

J. Bicknell, K.C., for defendant.

C. A. Moss, for plaintiffs.

FALCONBRIDGE, C.J.:—I have come to the conclusion, after consideration of the principles laid down in *Wright v. Hale*, 6 H. & N. 227, *Turnbull v. Forman*, 15 Q. B. D. 234, and numerous other cases here and in England, that sec. 22 of 6 Edw. VII. ch. 19 governs procedure only, and is therefore retrospective in its operation.

And of this opinion appears to have been my brother Britton in *Bell v. Goodison Thresher Co.*, ante 618. I would, of course, have followed his judgment without independent consideration, but it was contended that his expression of opinion on that point was not necessary for the determination of the point which he was dealing with.

There is no evidence that the Judge in the Division Court entered on any question of jurisdiction. He probably had not the notice or affidavit before him.

Prohibition must go—under all the circumstances without costs.

MACMAHON, J.

DECEMBER 31ST, 1906.

TRIAL.

PORT HOPE BREWING AND MALTING CO. v. CAVANAGH.

Company—Shares—Subscription—Increase of Capital Stock—Agreement to take Shares before Issue of Supplementary Letters Patent—No Necessity for Allotment—Company having no Shares to Sell.

Action by the company and John Crane as plaintiffs to recover the price of 5 shares of the capital stock of plaintiff company subscribed for by defendant.

plaintiffs.

R. E. Wood, Peterborough, and D. O'Connell, Peterborough, for defendant.

MACMAHON, J.:—The Ambrose Brewing and Malting Co. were incorporated on 25th June, 1889, under the Joint Stock Companies Letters Patent Act, with an authorized capital of \$100,000, divided into 200 shares of \$500 each; and on 22nd September, 1897, by an order in council, the name of the company was changed to the Port Hope Brewing and Malting Company Limited.

Having in view the reorganization of the company and increasing its capital stock to \$150,000, the company, by an agreement under their seal, dated 21st September, 1903, assigned all the shares of the company not then already assigned to the Ontario Bank to John Crane, of Peterborough, to be held by him under the trusts declared therein until the re-organization of the company.

The 6th clause of the agreement provides that "if the re-organization shall become effectual as herein contemplated, said John Crane shall assign or have allotted to the persons who have paid their subscriptions in full the number of shares to which they are respectively entitled."

On 29th January, 1904, the shareholders of the company sanctioned a by-law for increasing the capital stock of the company to \$150,000; and on 17th March, 1904, the company sanctioned a by-law for the re-division of the original capital from the existing shares of \$500 each into shares of \$100 each.

On 24th March, 1904, supplementary letters patent were issued to the company confirming the by-laws.

Section 21, sub-sec. 3, of the Ontario Companies Act, R. S. O. 1897 ch. 191, provides that "upon due proof so made (of the sanction by the shareholders of the by-law for increasing the capital stock or re-dividing the shares), the Lieutenant-Governor in council may by supplementary letters patent confirm the by-law . . . and thereupon from the date of the supplementary letters patent the shares shall be re-divided or the capital stock of the company shall be and remain increased or decreased as the case may be to the amount and in the manner and subject to the conditions

set forth by such by-law and supplementary letters patent, and the whole of the stock as so increased or decreased shall become subject to the provisions of this Act in like manner (so far as may be) as though every part thereof had originally formed part of the stock of the company."

The shares of the company held by Mr. Crane under the agreement of 21st September, 1903, were shares of \$500 each.

On 2nd January, 1904, defendant subscribed for 5 shares of the company's stock. . . . Alexander Elliott, one of the agents appointed by the agreement of 21st September, 1903, to solicit subscriptions for the stock of the company, was present when defendant subscribed, and said he read over to him the heading in the stock book, which is as follows:—

"Authorized Capital, \$150,000. Shares, \$100 each.

"We the undersigned do hereby severally, and not one for the other, subscribe for and agree to take the respective number of shares of the capital stock of the above named company set opposite our respective names as hereunder and hereafter written, and to become shareholders in such company to said amounts, which we promise and agree to pay as follows: ten per cent. thereof in one month from the date of subscription, and the remainder in 9 equal monthly instalments thereafter; it being agreed and understood that in the event of the proposed re-organization of said company becoming effectual, all sums paid by us respectively shall be repaid, with interest at the rate of 3 per cent. per annum.

"And we further severally appoint the secretary of the company our true and lawful attorney, for us respectively and in our respective names, to accept the transfer of such shares as shall be assigned to us to the extent of our said subscriptions."

Under the contract entered into by defendant in the share subscription book there is not, as there was in *Re Zoological and Acclimatization Society, Cox's Case*, 16 A. R. 543, any request that the number of shares for which he subscribed should be allotted to him. Defendant was not applying for shares. He "agrees to take the respective number of shares thereunder written and to become a shareholder to said amount," which he promises and agrees to

pay in 10 equal payments of 10 per cent. each, the first payment to be made in one month from the date of the subscription.

If therefore the company had on 2nd January, 1904, any stock to sell, this document is an absolute contract to take the 5 shares for which defendant subscribed and agreed to become a shareholder, and it was not necessary that the company should make an allotment of the shares; nor was it necessary that calls should be made, as he waived his right thereto and agreed to pay for the shares in 10 equal monthly instalments from the date of the subscription.

Section 21 of the Act provides that the capital of the company is increased and the shares of the company shall be re-divided as from the date of the supplementary letters patent. As defendant became a subscriber on 4th January, 1904, which was prior to either of the by-laws being assented to by the stockholders, and three months prior to the supplementary letters patent being issued, the company had no stock to sell.

Action dismissed with costs.

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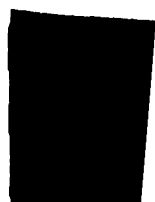
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